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TRANSCRIPT

OF

RECORD

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 82

INTERNATIONAL HARVESTER CREDIT CORPORATION, ET AL., APPELLANTS

vs.

ALLEN J. GOODRICH, EDWARD H. BEST AND F. ROBERTS BLAIR, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED MAY 16, 1955.

JURISDICTION NOTED OCTOBER 10, 1955.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION — THIRD DEPARTMENT

INTERNATIONAL HARVESTER CREDIT CORPORATION and BROCKWAY MOTOR COMPANY, INC., Plaintiffs,

against

ALLEN J. GOODRICH, EDWARD H. BEST and F. ROBERTS BLAIR,

Constituting the State Tax Commission of the State of New York, Defendants.

Submission and Statement of Facts—June 8, 1954

WHEREAS, the above named plaintiffs and defendants, the plaintiffs being corporations duly authorized to do business in the State of New York and the defendants, each being of full age, constituting the State Tax Commission of the State of New York, are parties to a question in difference which might be the subject of a special proceeding or an action and are desirous of submitting to the Supreme Court of the State of New York, Appellate Division, Third Department, the questions in dispute between them as hereinafter stated,

[fol. 2] NOW, THEREFORE, the above named plaintiffs and defendants do hereby agree upon the following case and submission containing a statement of the facts upon which the controversy between them depends, and do hereby submit the same to the above named Court for decision, as follows:

PARTIES

1. The plaintiff International Harvester Credit Corporation (hereinafter called International) is a foreign corporation duly incorporated under the laws of the State of Delaware, having its principal place of business in Chicago, Illinois, and is duly authorized to transact business in the State of New York.

2. The plaintiff Brockway Motor Company, Inc. (hereinafter called Brockway), is a domestic corporation duly

incorporated under the laws of the State of New York and has its principal place of business in Cortland, New York.

3. The defendant Allen J. Goodrich is the Commissioner of Taxation and Finance and a State Tax Commissioner of the State of New York and the defendants Edward H. Best and F. Roberts Blair are State Tax Commissioners of the State of New York, the three constituting the State Tax Commission of the State of New York, and are charged by law with the administration of Article 21 of the New York State Tax Law.

[fol. 3] CARRIERS' LIABILITY

4. Eastern Cartage and Leasing Co., Inc. (hereinafter called Eastern) is a domestic corporation duly incorporated under the laws of the State of New York and has its principal place of business in Schenectady, New York.

5. During the period between January 1952 and February 1954, Eastern was a carrier subject to the tax imposed by Article 21 of the Tax Law and owned at least fifteen motor vehicles as defined in said article which were operated on the public highways of this State.

6. During this period, by reason of such operation, Eastern incurred the following liability for taxes under this article:

a. For the period between January 1952 and June 1953, it filed incorrect returns and defendants duly assessed additional taxes in the amount of $2,407.70.

b. For the months of October and November 1953, it filed returns setting forth taxes due in the amount of $46.07 but failed to pay such taxes and assessments therefor were duly issued.

c. For the months of December 1953 and January 1954, it failed to file the required returns and defendants duly assessed taxes in the amount of $470.00.

d. For the month of February 1954 it failed to file the required return and defendants duly assessed taxes in the amount of $235.00.

[fol. 4] 7. The foregoing assessments of tax finally and conclusively fixed the tax due from Eastern since due notice

was given to it pursuant to Section 510 of the Tax Law and no application for revision was filed within 30 days of such notice.

8. Eastern is also liable for penalties and interest on said taxes in the amount of $539.27 up to April 21, 1954, and additional interest of 1% per month on $3,158.77 from April 21, 1954, making an aggregate liability for taxes, penalties and interest on April 21, 1954, of $3,698.04.

INTERNATIONAL

9. On March 17, 1953, International Harvester Company, a foreign corporation duly authorized to do business in the State of New York, sold to Eastern a certain Model L-205 International tractor, Serial Number 4805, Motor Number 17644 for $8,253.00.

10. Said Eastern, as part of the purchase price, duly executed and delivered to the seller a valid conditional sales agreement, covering the said vehicle for $6,541.00 and said conditional sales agreement was duly assigned to the plaintiff International. Said conditional sales agreement was duly filed, according to law, in the office of the Clerk of the Town of Rotterdam, Schenectady County, N. Y.

11. Said motor vehicle was subject to the provisions of Article 21 of the Tax Law. Eastern obtained the permit and plate required by said article for such motor vehicle which was operated on the public highways of this State. [fol. 5] 12. Said Eastern defaulted in making payments under the said conditional sales contract and on January 22, 1954, there was due and owing to plaintiff International under its conditional sales contract the sum of $4,578.79.

13. Said vehicle was duly replevied from Eastern by notice given January 22, 1954, and was duly repossessed by plaintiff International on January 26, 1954, and was duly sold at public sale on February 16, 1954.

14. Plaintiff International duly bid in the said vehicle at the public sale for $3,500.00.

15. On March 17, 1954, the said vehicle was sold by plaintiff International to Philomena Colafemina, 1732 State Street, Schenectady, New York, for $5,500.00 and said plaintiff warranted to said purchaser that it had a right to sell said vehicle and that it was free from any charge or encumbrance.

BROCKWAY —

16. Plaintiff Brockway on August 27, 1953, sold to Eastern a certain Model 154-WH-11 Brockway tractor, Serial Number 49634, Motor Number 46B4733 for $7,257.00.

17. Said Eastern, as part of the purchase price, duly executed and delivered to plaintiff Brockway a valid conditional sales agreement, covering the said vehicle, for $6,757.00. Said conditional sales agreement was duly filed according to law in the office of the Clerk of the Town of Rotterdam, Schenectady County, N. Y.

[fol. 6] 18. Said motor vehicle was subject to the provisions of Article 21 of the Tax Law. Eastern obtained the permit and plate required by said article for such motor vehicle which was operated on the public highways of this State.

19. Said Eastern defaulted in making payments under the said conditional sales contract and on March 26, 1954, there was due and owing to plaintiff Brockway under its conditional sales contract the sum of $5,625.00.

20. Said vehicle was duly repossessed by plaintiff Brockway from Eastern on March 26, 1954, and is still in the possesison of plaintiff Brockway. The value of such vehicle at that time did not exceed $5,625.00.

ASSERTION OF LIEN

21. On or about April 21, 1954, defendant asserted that a lien attached to each of the aforementioned motor vehicles in the amount of $3,698.04.

22. The amount of said lien asserted against each of the said motor vehicles includes all taxes, penalties and interest due from Eastern including (a) taxes incurred as a result of the operation of the three motor vehicles purchased from the respective plaintiffs as herein set forth, (b) taxes incurred as a result of the operation of other motor vehicles purchased from the respective plaintiffs and from others, (c) taxes for periods both prior and subsequent to the purchase of the aforesaid motor vehicles by Eastern from the plaintiffs, (d) taxes for periods prior to the repossession of said motor vehicles by plaintiffs which were [fol. 7] assessed prior to such repossession, (e) taxes for periods prior to the repossession of said motor vehicles

by plaintiffs which were assessed subsequent to such repossession, and (4) taxes for periods subsequent to the repossession of said motor vehicles by plaintiff International.

23. In lieu of seizing said motor vehicles, each of the plaintiffs was afforded an opportunity to obtain a release of the lien by filing a bond to secure the taxes due from Eastern.

24. The value of the aforementioned motor vehicles was in excess of $3,698.04 and each of the plaintiffs, to prevent the seizure of said vehicles and to insure their marketability, furnished a commercial bond, under protest, in the amount of $3,698.04, the full amount of the tax, penalties and interest assessed against Eastern, for the purpose of securing said taxes, penalties and interest pending a determination of the validity and extent of said lien and its priority, if any, over the plaintiffs' conditional sales contracts.

INTERNATIONAL MASSACHUSETTS SALE

25. On February 19, 1953, International Harvester Company, a foreign corporation duly authorized to do business in the State of New York, sold to Eastern a certain Model L-205 International tractor, Serial Number 4801, Motor Number 15553 for $8,253.00.

26. Said Eastern, as part of the purchase price, duly executed and delivered to the seller a valid conditional [fol. 8] sales agreement, covering the said vehicle, for $6,541.00 and said conditional sales agreement was duly assigned to the plaintiff International. Said conditional sales agreement was duly filed, according to law, in the office of the Clerk of the Town of Rotterdam, Schenectady County, New York.

27. Said motor vehicle was subject to the provisions of Article 21 of the Tax Law. Eastern obtained the permit and plate required by said article for such motor vehicle which was operated on the public highways of this State.

28. Said Eastern defaulted in making payments under the said conditional sales contract and on January 22, 1954, there was due and owing to plaintiff International under its conditional sales contract the sum of $4,578.79.

29. Said vehicle was duly replevied from Eastern by

notice given January 22, 1954, and was duly repossessed by plaintiff International on January 26, 1954, and was duly sold at public sale on February 16, 1954.

30. Plaintiff International duly bid in the said vehicle at the public sale for the amount of $3,500.00.

31. On March 17, 1954, the said vehicle was sold by plaintiff International to Bowe Oil, Inc., 99 Holland Avenue, Adams, Massachusetts, for $4,300.00. Bowe Oil, Inc., is a foreign corporation not authorized to do business in the State of New York. Said vehicle is not now and has not since March 17, 1954, been operated in this State.

32. Defendants assert that the aforesaid lien for taxes, penalties and interest due from Eastern attached to the [fol. 9] proceeds received by plaintiff International from said sale.

PLAINTIFF'S CONTENTIONS

33. Article 21, and in particular Section 506, of the Tax Law of the State of New York violates the United States Constitution and the New York State Constitution and is therefore invalid and unenforceable against these plaintiffs to the extent that it purports to make their interests, as conditional vendors, in said vehicles subordinate to the subsequently arising lien of the State for highway use fees, taxes, penalties and interest assessed and accruing against the operating carrier. The creation of such a priority and its enforcement against plaintiffs' interests, constitutes a taking of said interest to pay the personal obligation of the conditional vendee, which said taking is an arbitrary and unjustifiable deprivation of plaintiffs' property without due proces of law, contrary to the provisions of Amendment 14 of the United States Constitution and Article I, Section 6 of the Constitution of the State of New York.

34. Article 21, and in particular Section 506, of the Tax Law of the State of New York is invalid and unenforceable against these plaintiffs under Amendment 14 of the United States Constitution and Article I, Section 6, of the New York Constitution, to the extent that it purports to subordinate the interests of plaintiffs, as conditional vendors, in said vehicles to the State's lien for all fees, taxes, penalties and interest assessed or accruing against the operating carrier under Article 21, without regard to

[fol. 10] the origin of such liabilities or the identity of the vehicle whose use created such liability. The creation of such a priority and its enforcement against plaintiffs' interests constitute a taking of plaintiffs' property which cannot be justified by reference to a tax imposed upon the carrier, or upon any other grounds, and which, therefore, must be considered a deprivation of plaintiffs' property without due process of law.

35. Article 21, and in particular Section 506, of the Tax Law of the State of New York is invalid and unenforceable against these plaintiffs under Amendment 14 of the United States Constitution and Article I, Section 6, of the New York State Constitution to the extent that it purports to subordinate the interests of the plaintiffs, as conditional vendors, in said vehicles to the State's lien for fees, taxes, penalties and interest assessed or accruing against the operating carrier prior to the creation of carrier's interest in said vehicles or the use of said vehicles on the highways of the State. The creation and enforcement of such a priority is arbitrary and unjustifiable and reprives plaintiffs of their property without due process of law.

36. Article 21, and in particular Section 506, of the Tax Law of the State of New York is invalid and unenforceable against these plaintiffs under Amendment 14 of the United States Constitution and Article I, Section 6, of the New York State Constitution to the extent that it purports to subordinate the interest of the plaintiffs, as conditional vendors, in said vehicles to the State's lien for fees, taxes, penalties and interest assessed or accruing against the operating carrier after the date when the plaintiffs re-[fol. 11] possessed said vehicles from the vendee or carrier. The creation and enforcement of such a priority is arbitrary and unjustifiable and takes plaintiffs' property to pay the personal obligation of the vendee or carrier. Such action on the part of the State and its officers deprives plaintiffs of their property without due process of law.

37. Article 21 of the Tax Law of the State of New York is invalid and unenforceable against plaintiffs in that the procedure provided therein for the accrual, assessment, determination and enforcement of the highway use tax, and

the fees, penalties and interest incidental thereto, fail to give plaintiffs a fair, adequate and timely notice and hearing as to such matters, thereby permitting plaintiffs' interest in said vehicles, as conditional vendors, to be taken from them without a reasonable opportunity to be heard, and depriving plaintiffs of their property without due process of law, contrary to the provisions of Amendment 14 of the United States Constitution and Article I, Section 6, of the New York State Constitution.

38. Article 21, and in particular Section 506, of the Tax Law of the State of New York is invalid and unenforceable against plaintiffs in that it denies plaintiffs the equal protection of the laws, in violation of Amendment 14 of the United States Constitution in that the tax lien liability of plaintiffs' security interest in said vehicles, or any other vehicle they might sell to a carrier operating within New York, is determined, according to a classification based on factors with no relevance to the plaintiffs or their security interests. The method of measuring the tax lien is such that similarly situated security interests may be sub-[fol. 12] ject to liens in different amounts without reasonable basis for the discrimination.

39. Article 21 of the Tax Law of the State of New York is invalid as to these plaintiffs in that it violates Amendment 14 of the United States Constitution and Article I, Section 6, of the New York State Constitution by creating an irrebutable presumption that plaintiffs, as conditional vendors, consented that their vehicles might be used on the highways of New York and that they should be subject to the liability imposed upon them by the Tax Law. The taking of plaintiffs' property under the authority of such a presumption deprives plaintiffs of such property without due process of law.

Defendants' Contentions

40. Defendants contend that, pursuant to Article 21 of the Tax Law, a lien of the State for taxes, penalties and interest due under said Article attached to each of the aforementioned motor vehicles of Eastern as soon as it was operated on the public highways of this State.

41. Defendants further contend that said lien attached to

each of the aforementioned motor vehicles, in the amount of $3,698.04, and is paramount to any liens of plaintiffs thereof by reason of their conditional sales agreements.

42. Defendants further contend that the motor vehicle repossessed by plaintiff Brockway and still in its possession, is subject to the aforesaid lien of the State.

43. Defendants further contend that the motor vehicle repossessed by plaintiff International and sold to Philo- [fol. 13] mena Colafemina, is subject to the aforesaid lien of the State.

44. Defendants further contend that the proceeds of the sale of the motor vehicle by plaintiff International to Bowe Oil, Inc., is subject to the aforesaid lien of the State.

45. Defendants further contend that the provisions of Section 506 of the Tax Law and the attachment of the lien thereunder to each of the aforesaid motor vehicles and to the proceeds of the motor vehicle sold by plaintiff International to Bowe Oil, Inc., does not violate any provisions of the Constitution of the United States or of the Constitution of the State of New York.

WHEREFORE, the parties plaintiff and defendants above named pray the decision and judgment of this Honorable Court upon all and singular the matter in difference and the controversy between them above stated.

The judgment asked for by the plaintiffs is:

1. That the alleged liens asserted by the defendants be declared secondary and subordinate to the conditional sales contracts held by the plaintiffs and that the bonds filed by the plaintiffs to secure the payment of such liens be forthwith cancelled and returned to the plaintiffs.

2. A declaratory judgment by this Court that the provisions of Article 21 of the Tax Law are unconstitutional under Article I, Section 6, of the Constitution of the State of New York and Amendment 14 of the United States Constitution insofar as they purport to establish any lien prior or paramount to the inter- [fol. 14] ests held by the plaintiffs in such motor vehicles.

The judgment asked for by defendants is that the liens asserted by the defendants under Article 21 of the Tax Law for the full amount of taxes, penalties and interest due from Eastern be declared to have attached to each motor vehicle of Eastern and to be prior and paramount to any lien of plaintiffs on such motor vehicles under their conditional sales agreements and that defendants recover judgment on account of such lien against the plaintiffs in the sum of $3,698.04 with interest on $3,158.77 at 1% per month from April 21, 1954.

The parties further agree that the Court shall render such judgment as shall be proper on the above facts without costs to either party.

It is hereby stipulated and agreed that the foregoing facts are the facts upon which this controversy is founded; that the controversy be determined by the Supreme Court, Appellate Division, Third Department; that the said Court shall render judgment thereon, and that this submission and all the papers herein shall be filed with the Clerk of Albany County.

Dated, June 8, 1954.

Brockway Motor Company, Inc., International Harvester Credit Corporation, Plaintiffs, by F. B. Mattingly (Seal).

[fol. 15] State Tax Commission, Defendant, by Allen J. Goodrich, President, State Tax Commission; by F. Roberts Blair, State Tax Commissioner.

DeGraff, Foy, Conway and Holt-Harris, Attorneys for Plaintiffs, 11 North Pearl Street, Albany, New York; Nathaniel L. Goldstein, Attorney for Defendant, State Capitol, Albany, New York.

[fols. 16-18] *Duly sworn to by Allen J. Goodrich and F. B. Mattingly. Jurats omitted in printing.*

[fol. 19] STIPULATION WAIVING CERTIFICATION (omitted in printing)

[fol. 20] IN THE SUPREME COURT—COUNTY OF ALBANY

NOTICE OF APPEAL—August 12, 1954

SIRS:

Take notice that the plaintiffs hereby appeal to the Court of Appeals from the order of the Appellate Division, Third Department, entered in the office of the Clerk of the Appellate Division, Third Department, on the 9th day of August, 1954, and from the judgment entered thereon in the office of the Clerk of the County of Albany on the 10th day of August 1954, and from each and every part of said order and judgment.

This appeal is taken as of right, pursuant to Section 588, Subdivision 1 of the Civil Practice Act, on the ground that there is directly involved the construction of the Constitution of the State and of the United States.

Dated: Albany, N. Y., August 12, 1954.

Yours, etc., DeGraff, Foy, Conway and Holt-Harris, Attorneys for Plaintiffs-Appellants, Office and Post Office Address, 11 North Pearl Street, Albany, New York.

To: Clerk of the County of Albany and Nathaniel L. Goldstein, Esq., Attorney General of the State of New York, Attorney for Defendants-Respondents.

[fol. 21] IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

DECISION

Judgment granted to the defendants according to the submission, except as to taxes accrued after re-possession of the respective trucks by the plaintiffs, without costs.

Settle the form of judgment on notice.

Opinion by Imrie, J.

Foster, P.J., Bergan and Halpern, JJ., concur.

Coon, J., not voting.

[fol. 22] IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

OPINION—JULY 8, 1954

Argued May Term, 1954.
Decided July 8, 1954.

Before Hon. Sydney F. Foster, Presiding Justice, Hon. Francis Bergan, Hon. William H. Coon, Hon. Philip Halpern, Hon. Daniel F. Imrie, Associate Justices

Submission of a controversy on an agreed statement of facts pursuant to Section 546 of the Civil Practice Act concerning constitutional validity of the paramount lien provisions of Section 506 of the Tax Law enacted to secure the payment of the Highway Use Tax imposed by Article 21 thereof.

DeGraff, Foy, Conway and Holt-Harris (John T. DeGraff, Ralph D. Semerad and John J. Kelly, Jr., of Counsel), Attorneys for Plaintiffs, 11 North Pearl Street, Albany, New York.

Nathaniel L. Goldstein (Wendell P. Brown, Solicitor General, John C. Crary, Jr., and Robert W. Bush, Assistant Attorneys General, of Counsel), Attorney General, Attorney for Defendants, State Capitol, Albany New York.

[fol. 23] IMRIE, J.:

The parties have submitted this controversy upon a stipulated statement of facts pursuant to Section 546 of the Civil Practices Act. Plaintiffs ask for judgment that the tax lien priority asserted by defendants under Article 21 of the Tax Law (Highway Use Tax Law) be declared unconstitutional and invalid, and that certain bonds filed by them, under protest, to secure payment of such liens be cancelled and returned.

In 1953 International Harvester Company and Brockway Motor Company, Inc., sold three tractors to Eastern Cartage and Leasing Company, Inc. (herein referred to as Eastern), a carrier subject to the tax imposed by Article 21. The carrier owned at least fifteen motor vehicles as defined in the article. In each sale the vendor took a valid conditional sales agreement as a portion of the purchase price. Each vehicle became subject to Article 21.

The conditional sales agreements pertaining to the two sales by International Harvester Company were duly assigned to plaintiff International. Plaintiff Brockway held the sales agreement taken by it. Eastern defaulted in making payments on all of the contracts and the several tractors were repossessed.

About April 21, 1954, defendants asserted that a lien in the amount of $3,698.04 attached to each of the three motor vehicles above mentioned. Such lien included all unpaid taxes, penalties and interest due from Eastern, including, in addition to taxes incurred as the result of the operation of those three vehicles, (a) taxes incurred by Eastern as the result of the operation of other vehicles purchased from plaintiffs and other vendors, (b) taxes for periods [fol. 24] both prior and subsequent to the purchase of the three specified vehicles from these plaintiffs, (c) taxes for periods prior to plaintiffs' repossession of the three assessed prior to the repossession, (d) taxes for periods prior to repossession assessed after such repossession, and (e) taxes subsequent to the repossession of the vehicles by International. The Brockway truck remained in the possession of that company. International sold its tractors to third parties. Plaintiffs have been permitted to file bonds to obtain the release of the trucks from the liens.

This court affirmed the validity of Article 21 in *Mid-States Freight Lines, Inc.* v. *Bates* (279 App. Div. 451, aff'd. without opinion, 304 N. Y. 700, cert. den., 345 U. S. 908). This controversy involves the application of the lien priority imposed by section 506 thereof.

Section 505 requires every subject carrier to file with the tax commissioner "on or before the twentieth day of each month a return for the preceding calendar month during which any vehicular unit was operated in this state * * *." Section 506 directs that each carrier shall pay the required tax at the time of filing the return and provides that "The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid,

or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights [fol. 25] of any holder of the legal title in or to any such motor vehicle or vehicular unit."

The sum of plaintiffs' contention is that such lien priority denies them the equal protection of the law, subordinates their liens, and takes their property without due process unreasonably and arbitrarily. They assert that this is done to satisfy Eastern's tax obligation to pay for highway use by its other vehicles, which includes the tax obligation which had accrued before Eastern purchased and used plaintiff's vehicles and a similar obligation accruing after the repossession of the vehicles by plaintiffs. We believe that the basic issue here is, as defendants argue, whether the State may secure its prerogative right to the payments of its taxes by making that right paramount to plaintiffs' security for their private debts. The other matters discussed relate themselves to that issue.

The prerogative right of priority of payments of debts due it from an insolvent over those due private creditors exists in the State as the successor of the Crown. The common law gave the king such preference. By virtue of our 1777 Constitution that part of the common law continued to be the law of this State. Later Constitutions have, in effect, retained that provision. The priority arises and exists independently of statute. (*Matter of Carnegie Trust Company*, 206 N. Y. 390, 396, 397; *Matter of Grunér*, 295 N. Y. 510, 522, 523; *Marshall v. New York*, 254 U. S. 380, 382-384.) "The only changes of the right made by statute have been by way of enlarging its scope in certain cases. Thus, while by the common law of England * * * the priority does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the legislature of [fol. 26] New York extended the prerogative right, so as to give certain taxes priority over prior encumbrances. An extension of this nature is found in Section 197 of the Tax Law * * *. By reason of that provision the annual franchise tax takes priority over encumbrances on the corporate property." (*Marshall v. New York, supra*, pp. 383, 384.)

The power to declare the lien of the tax paramount to all

prior liens and encumbrances and to the rights of a holder of the legal title of the motor vehicle is beyond question. It is not unreasonable or arbitrary to fix upon the carrier's motor vehicles as subject of the lien. That provision is a corollary to and a necessary implementation of the mechanics of a fundamental right of priority.

The tax is imposed on the carrier as he avails himself of the use of the State's highways. It is determined by the extent of that use, irrespective of the number of trucks employed. If he fails to pay the tax, recourse may be had to his property, a common and recognized procedure. Sound reason justifies the method of enforcing the payment of the tax adopted in this statute. It could well happen that trucks constitute the sole tangible resources of a carrier. The nature of the ownership and possession of trucks is transient. It would be neither safe, practicable nor reasonable to apportion the lien of an unpaid tax on the basis of each of several vehicles' actual use of the higliway. Such a prorating or subdivision is no more to be expected than where a state seeks to collect an income tax from a nonresident by enforcing payment of the tax and considering his property and business interests in the state as a single [fol. 27] entity in order to enforce payment of the tax by lien thereon. (*Shaffer* v. *Carter*, 252 U. S. 37, 59.) In that case, adverting to the probability of changes in the units of the individual taxpayer's property and business, Mr. Justice Pitney said, "The entire jurisdiction of the state over appellant's property and business and the income he derives from them * * * is a jurisdiction in rem; and we are clear that the state acted within its lawful power in treating his property interests and business as having *both unity and continuity.*" (Emphasis supplied.)

Plaintiffs' contention of the invalidity of the statute because it has no provision for notice of assessment of tax deficiencies and provides for seizure and sale of vehicles without notice (Section 511, Subd. 3) to parties situated as are plaintiffs ties into their criticism of the statutory secrecy accorded returns required by the statute (Section 514).

As a basic proposition, every presumption is in favor of the validity of a statute. The tax imposed by Article 21 has been determined to be a valid tax. (*Hid-States*

Freight Lines, Inc., v. Bates, supra.) The power of the State to establish priority for tax debts due it cannot be questioned. Entire exactitude in the application of taxes, while a desirable goal, cannot always be attained. Here the plaintiffs point out dire possibilities of unequal exactions. On the record before us we cannot say that the plaintiffs' trucks constitute the sole fund from which Eastern's tax liability may be satisfied in the event Eastern cannot pay its own debt. It does not indicate whether the lien of the tax has been asserted against other motor vehicles of Eastern. It does not indicate that Eastern is insolvent or in receivership, though that might be a reasonable assumption. [fol. 28] In any event the unconstitutionality of a law is not to be determined solely on the ground that some hardship may result from its application. (*New York Rapid Transit Corp. v. City of New York*, 275 N. Y. 258, 265, 266.) In measuring its validity it is not reasonable to assume that the tax authorities will enforce it in such a manner as to produce uncalled for hardship or inequity. Conversely, Mr. Justice Holmes has said (*Gast Realty & Investment Company v. Schneider Granite Company*, 240 U.S. 55, 58, 59), "But * * * if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

The parties are in proper agreement in one respect. The law does not bar a conditional vendor from repossessing a motor vehicle subject to the State's lien or impose a lien on such a chattel for taxes accruing after its repossession.

It is urged that the assertion of the paramount lien will raise obstacles to the widespread commercial dealings in motor trucks. That is not sufficient to divest the State of the exercise of its power. Some of the problems suggested by plaintiffs in this respect related to the "secrecy" proceedings could be solved by administrative action or by suitable legislation for furnishing information of tax liabilities and amounts thereof to persons dealing in trucks.

Judgment should be granted to defendants in accordance

with the submission, except as to taxes accrued after repossession of the respective trucks by the plaintiffs, without costs.

[fol. 29] IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

ORDER

The parties above named having submitted this controversy upon a case containing an agreed statement of facts, pursuant to Sections 546-548 of the Civil Practice Act, and said submission, duly executed and acknowledged, having been filed in the office of the Clerk of Albany County on the 15th day of June 1961 and the cause having duly come on to be heard before this Court,

Now, after hearing John T. McGraff, Esq., of counsel for the plaintiffs, and John C. Crary, Jr., Assistant Attorney General, of counsel for the defendants, and due deliberation having been had thereon, it is, on motion of Nathaniel L. Goldstein, Attorney General, attorney for defendants,

Ordered (Mr. Justice Coon not voting) that judgment be, and the same hereby is, granted to the defendants according to the submission, except as to taxes accrued after repossession of the respective trucks by the plaintiffs, without costs.

[fol. 30] The Court finds the facts as stated in the agreed statement of facts and, upon said statement and the stipulation of the attorneys for the respective parties, annexed hereto, further finds that all of the liability for unpaid highway use taxes, in the total amount of $3,158.77, exclusive of interest and penalties, for which liens involved in this submission were asserted by defendants, accrued before repossession by the plaintiff Brockway Motor Company, Inc., of the truck sold by said plaintiff on conditional sale and that $2,884.61 of said tax liability accrued before repossession of the two trucks sold by International Harvester Company under contracts of conditional sale assigned to the plaintiff International Harvester Credit Corporation; it is further

Ordered that judgment be entered hereon by the Clerk of the County of Albany, declaring that the lien asserted by the defendants under Article 21 of the Tax Law for taxes, penalties and interest due from Eastern Cartage and Leasing Company, Inc., attached to the vehicles sold to said Eastern by the plaintiffs, except as to taxes accruing after repossession of said vehicles, and became valid prior and paramount liens superior to any lien of plaintiffs on such motor vehicles under their conditional sale agreements to the extent of $3,698.04 with respect to the vehicle sold by the plaintiff Brockway Motor Company, Inc., together with interest at 1% per month from April 21, 1954 on $3,158.77 and to the extent of $3,409.78 with respect to the vehicles repossessed by the plaintiff International Harvester Credit Corporation, together with interest at 1% per month from April 21, 1954 on $2,884.61; and further adjudging that the [fol. 31] defendants recover from the plaintiffs on account of such lien the amount of unpaid taxes, penalties and interest in the sum of $3,698.04, with interest on $3,158.77 at 1% a month from April 21, 1954 as against the plaintiff Brockway Motor Company, Inc., and in the sum of $3,409.78, with interest on $2,884.61 at 1% a month from April 21, 1954, as against the plaintiff International Harvester Credit Corporation, without costs.

John S. Herrick, Clerk.

[fol. 32] In the Supreme Court of New York Appellate Division—Third Department.

Stipulation of Facts—August 8, 1954.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the highway use taxes involved in this submission to the extent of $2,884.61 had accrued against Eastern Cartage and Leasing Company, Inc., before repossession on January 26, 1954 of the two vehicles by the plaintiff International Harvester Credit Corporation and that the amount of penalties and interest owing on account thereof on April 21, 1954 was $525.17, making a total of $3,409.78; and it is further stipulated and agreed that all the tax liability for which the lien was asserted by defendants had accrued prior to repos-

session of the vehicle by the plaintiff Brockway Motor Company, Inc.

Dated: August 8, 1954.

DeGraff, Foy, Conway and Holt-Harris, Attorneys for Plaintiffs. Nathaniel L. Goldstein, Attorney General, Attorney for Defendants.

[fol. 33] IN THE SUPREME COURT OF NEW YORK, COUNTY OF ALBANY

JUDGMENT—August 10, 1954

The parties above named having submitted this controversy upon a case containing an agreed statement of facts, pursuant to Sections 546-548 of the Civil Practice Act, and said submission, duly executed and acknowledged, having been filed in the office of the Clerk of Albany County on the 15th day of June, 1954 and the cause having duly come on to be heard in the Appellate Division of the Supreme Court, Third Judicial Department and having been argued by John T. DeGraff, Esq., of counsel for the Plaintiffs; and John C. Crary, Jr., Assistant Attorney General, of counsel for the defendants, and the Court, after due deliberation, having rendered its unanimous decision (Mr. Justice Coon, not voting) and entered its order thereon directing judgment as hereinafter stated, in the office of the Clerk of said Appellate Division, on the 9th day of August, 1954.

Now, upon reading and filing a certified copy of said order, together with the original case upon which the submission was heard, and upon motion of Nathaniel L. Goldstein, Attorney General, attorney for defendants, it is

Adjudged and Declared that the lien asserted by the defendants under Article 21 of the Tax Law for taxes, penalties and interest due from Eastern Cartage and Leasing Company, Inc., attached to the vehicles sold to said Eastern Cartage and Leasing Company, Inc., except as to taxes accruing after repossession of said vehicles, and became valid prior and paramount liens superior to any lien of plaintiffs on such motor vehicles under their conditional sale

[fol. 34] agreements to the extent of $3,698.04 with respect to the vehicle sold by the plaintiff Brockway Motor Company, Inc., together with interest at 1% per month from April 21, 1954 on $3,158.77 and to the extent of $3,409.78 with respect to the vehicles repossessed by the plaintiff International Harvester Credit Corporation, together with interest at 1% per month from April 21, 1954 on $2,884.61, and it is

Adjudged that the defendants recover from the plaintiffs on account of such lien the amount of unpaid taxes, penalties and interest in the sum of $3,698.04, with interest on $3,158.77 at 1% a month from April 21, 1954 as against the plaintiff Brockway Motor Company, Inc., and in the sum of $3,409.78, with interest on $2,884.61 at 1% a month from April 21, 1954, as against the plaintiff International Harvester Credit Corporation, without costs.

Judgment signed and entered this 10th day of August, 1954.

(S.) Donald L. Lynch, Clerk.

[fols. 35-36] Stipulation Waiving Certification—(Omitted in Printing)

[fol. 37] In the Court of Appeals, State of New York

No. 250

International Harvester Credit Corporation & ano., Appellants

vs.

Allen J. Goodrich, & ors., constituting the State Tax Commission of the State of New York, Respondents

Opinion

Van Voorhis, J. (dissenting):

As conditional vendors of commercial motor vehicles, appellants' property in these vehicles has been destroyed through subordination to accumulated highway use taxes (Article 21 of the Tax Law accruing with reference to other

vehicles owned and operated by the conditional vendee, in many instances prior to delivery to the vendee of appellants' automotive equipment. Appellants could not have ascertained the tax liabilities of the vendee prior to sale, even if the books of the State Tax Commission had been open to them, inasmuch as the vendee had filed incorrect tax returns. A similar situation existed during the periods of time while appellants' motor vehicles were in the possession of the conditional vendee. Highway use taxes accruing with respect to the vehicles sold by appellants can be given priority over appellants' property interests in those vehicles, but it seems to me to constitute deprivation of property without due process of law and denial of the equal protection of the laws, to subject the recognized property interest of a conditional vendor to taxes which have accrued against the conditional vendee without reference to these vehicles, and in substantial part, before they were delivered to the conditional vendee or even manufactured. In voting to modify the judgment appealed from in these respects, I do not imply that some of the objects of this part of [fol. 38] Article 21 of the Tax Law could not be realized by legislation giving effect to legitimate property rights of conditional vendors under such circumstances.

* * * * * * *

Judgment affirmed. No opinion; all concur except Van Voorhis, J., who dissents in an opinion.

* * * * * * *

[fol. 39] In the Court of Appeals, State of New York

Remittitur—December 31, 1954.

[fol. 40] No. 250.

International Harvester Credit Corporation & Ano., appellants

vs.

Allen J. Goodrich, & Ors., Constituting the State Tax Commission of the State of New York, respondents

Be It Remembered, That on the 25th day of August in the year of our Lord one thousand nine hundred and fifty-four,

International Harvester Credit Corporation & ano., the appellants in this cause, came here unto the Court of Appeals, by DeGraff, Foy, Conway & Holt-Harris, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Allen J. Goodrich, & ors., constituting the State Tax Commission of the State of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. John T. DeGraff, of counsel for the appellants, and by Mr. Henry S. Manley, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the [fols. 41-42] Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before Justices thereof, &c.

(S.) Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, December 31, 1954

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 43] IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

INTERNATIONAL HARVESTER CREDIT CORPORATION AND BROCKWAY MOTOR COMPANY, PLAINTIFFS-APPELLANTS

against

ALLEN J. GOODRICH, EDWARD H. BEST AND F. ROBERTS BLAIR, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, DEFENDANTS-RESPONDENTS

JUDGMENT ON REMITTITUR—Jan. 10, 1955

The plaintiffs above named having appealed to the Court of Appeals from an order of the Appellate Division, Third Judicial Department entered in the Office of the Clerk of the Appellate Division, Third Judicial Department on the 9th day of August, 1954, directing judgment in favor of respondents in the above-entitled action instituted upon a submission of controversy, and from the judgment duly entered thereon in the Office of the C[illegible]k of the County of Albany on the 10th day of August, 1954, and the appeal having been duly argued before said Court of Appeals, and after due deliberation had thereon, and the Court of Appeals having made its decision, and by its remittitur dated December 31, 1954 having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court so appealed from be affirmed, and having further ordered that the proceedings herein be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law;

[fols. 44-45] Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Jacob K.

Javits, Attorney General of the State of New York, Attorney for the above-named Respondents, it is;

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

John S. Herrick, Clerk.

(Seal)

A true copy, John S. Herrick, Clerk, Ent. 1-12-55.

[fol. 46] In the Supreme Court of the State of New York, Appellate Division—Third Department

(Title omitted)

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that the International Harvester Credit Corporation, and Brockway Motor Company, Inc., the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of affirmance entered by the Court of Appeals of the State of New York in this action on December 31, 1954. This appeal is taken pursuant to 28 U. S. C. 1257 (2).

II. The Clerk will please prepare the entire transcript of the record in this cause, including this Notice of Appeal, for transmission to the Clerk of the Supreme Court of the United States.

III. The following questions are presented by this appeal:

Whether the lien provisions of Article 21 of the New York Tax Law, as applied to appellants, are arbitrary, unreason-
[fol. 47] able and discriminatory, contrary to the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

DeGraff, Foy, Conway and Holt-Harris, Attorneys for International Harvester Credit Corporation, and Brockway Motor Company, Inc., Appellants.

[fols. 48-50] AFFIDAVITS OF SERVICE OF NOTICE OF APPEAL (omitted in Printing)

[fol. 51] Clerk's Certificate to foregoing Record omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 82.

INTERNATIONAL HARVESTER CREDIT CORPORATION ET AL., Appellants,

vs.

ALLEN J. GOODRICH ET AL., Constituting the State Tax Commission of the State of New York

Appeal from the Court of Appeals of the State of New York.

ORDER NOTING PROBABLE JURISDICTION—October 10, 1955

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

LIBRARY
SUPREME COURT, U.S.

(Office Supreme Court, U.S.
FILED
MAY 18 1955
HAROLD B. WILLEY, Clerk

No. 801

IN THE

Supreme Court of the United States

INTERNATIONAL HARVESTER CREDIT CORPORATION, et al., *Appellants*,

v.

ALLEN J. GOODRICH, et al., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

JOHN LORD O'BRIAN,
701 Union Trust Bldg.,
Washington 5, D. C.,
Counsel for Appellants.

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IN THE

Supreme Court of the United States

No.

INTERNATIONAL HARVESTER CREDIT CORPORATION, et al., *Appellants*,

v.

ALLEN J. GOODRICH, et al., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Appeals of the State of New York entered on December 31, 1954, sustaining the validity, under the United States Constitution, of Section 506 of Article 21 of the New York Tax Law. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal questions are presented.

OPINIONS BELOW

The New York Court of Appeals affirmed without a majority opinion the judgment of the Appellate Division of the Supreme Court of New York. The dissenting opinion in the New York Court of Appeals is annexed hereto as Appendix A. The opinion of the Appellate Division of the Supreme Court of New York dated July 8, 1954, which was reviewed and affirmed by the Court of Appeals is annexed hereto as Appendix B. It is reported at 284 App. Div. 604, 132 N.Y.S. 2d 511.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1954. On March 18, 1955, notice of appeal to this Court was served on appellees and filed in the Appellate Division of the Supreme Court of New York, Third Department, the Court now possessed of the record herein.

The jurisdiction of this Court to review said judgment is conferred in Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: *Nashville, Chattanooga & St. Louis Railroad* v. *Walters*, 294 U.S. 405; *Myles Salt Company* v. *Iberia Drainage Board*, 239 U.S. 478; *Thomas* v. *Kansas City & Southern Ry. Co.*, 261 U.S. 481; *Smith* v. *Cahoon*, 283 U.S. 553; *Frost* v. *Corporation Commission*, 278 U.S. 515.

QUESTION PRESENTED

Whether Article 21 of the Tax Law of the State of New York imposing a highway use tax is consistent with the Due Process clause of the Fourteenth Amendment to the Constitution to the extent that it author-

izes in Section 506 the taking of appellant's property in vehicles, of which it was the conditional vendor to an operating carrier and taxpayer, to satisfy all fees, taxes, penalties and interest accruing against the operating carrier, without regard to the origin of such tax liabilities or the identity of the vehicles by whose use the tax liabilities were created.

STATUTES INVOLVED

Sections 503 and 506 of Article 21 of the New York Tax Law are set forth in Appendix C.

STATEMENT

Pursuant to Section 546 of the New York Civil Practice Act, this controversy was submitted on a stipulated statement of facts to the Appellate Division of the Supreme Court of the State of New York, Third Department, on June 8, 1954 (R. 1-15). Appellants' contention, as stated in that Submission and Statement of Facts (R. 11-13), included the claim that Section 506 of Article 21 of the New York Tax Law was invalid and unenforceable under the Fourteenth Amendment of the United States Constitution. The Appellate Division passed on this question and held that the provision in question was valid under the United States Constitution (R. 28, 33). An appeal to the New York Court of Appeals was taken as of right, under Section 588 (1) of the New York Civil Practice Act, on the ground that the case directly involved the construction of the United States Constitution (R. 20). The Court of Appeals affirmed (R. 40).

In 1953 International Harvester Company and appellant Brockway Motor Company, Inc. (hereafter Brockway) sold three tractors (*i.e.*, the automotive portion of a tractor-trailer) to Eastern Cartage and

Leasing Co., Inc. (hereafter Eastern). (R. 4, 5, 7). In each sale, appellants took a valid conditional sales agreement, reserving the title in the vehicles in themselves as security for payment of the purchase price. The conditional sales agreement pertaining to the two tractors sold by International Harvester Company were assigned to appellants International Harvester Credit Corporation (hereafter International) (R. 4, 6). On January 22, 1954, International replevied the two tractors from Eastern for default in payment of the balance then due, amounting to $4,578.79 on each tractor (R. 5, 8). Both tractors were repossessed and purchased at public sale by International on February 16, 1954, for $3,500 each (R. 5, 8). On March 26, 1954, Brockway repossessed the tractor which it had sold to Eastern for default in the payment of $5,625 (R. 6). It is stipulated that the value of this tractor at the time of repossession did not exceed $5,625 (R. 6). On March 17, 1954, International sold one of the tractors to Philomena Colafemina of Schenectady, New York, and warranted that the tractor was free from any charge or encumbrance (R. 5). On the same day, International sold the other tractor to a Massachusetts corporation for operation outside the State of New York. (R. 8). Brockway still possesses the tractor which it repossessed from Eastern (R. 6).

More than a month later, on April 21, 1954, appellees, for the first time, asserted that a lien amounting to $3,698.04 attached to each of the two tractors then in the State of New York, and to the $4,300 which International had received in payment for the tractor which had been sold to the Massachusetts corporation (R. 6). It developed that Eastern, a carrier subject to the highway use tax imposed by Article 21 of the New York Tax Law, had become delinquent in filing

its return and paying its taxes prior to its purchase of the three tractors from appellants, and that, due to its entire course of operations from January 1952 to February 1954, Eastern was liable for taxes, penalties and interest aggregating $3,698.04 (R. 3-4). These taxes were levied on Eastern for the operation of at least 15 motor vehicles on the public highways (R. 3). At the time of the conditional sale of the three tractors by appellants to Eastern, appellees had taken no action with respect to the taxes in question.

Article 21 of the New York Tax Law imposes a highway use tax "for the privilege of operating any vehicular unit upon the public highways" of New York. Sec. 503. This use or privilege tax is imposed "upon the carrier except that where the carrier is not the owner . . . the tax shall be a joint and several liability upon both the owner and the carrier." Sec. 503. The highway use tax is measured by the number of vehicles and the weight and amount of highway use of each vehicle. The carrier and the owner are under a duty to keep records and make returns. Failure to fulfill such duties calls for the imposition of penalties. It is further required that all reports and returns made under Article 21 be kept secret, as is the lien which is not required to be filed or recorded. Sec. 514. Thus, it was impossible for appellants to have had any knowledge of Eastern's tax delinquency at the time of the conditional sales by them to Eastern.

All taxes, fees, penalties and interest become a prior lien upon every vehicle operated by delinquent carrier. The lien attaches to any vehicle the moment it is operated on the public highway by the carrier. Thus, once the tax accrues as to any vehicle operated by the carrier, it becomes a prior charge upon all vehicles operated by the carrier irrespective of ownership. The

lien is expressly made "paramount to all prior liens and encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit". Sec. 506.*

According to the stipulation of facts (R. 6), the amount of the lien asserted against each of the three tractors owned by appellants includes:

> "(a) taxes incurred as a result of the operation of the three motor vehicles purchased from the respective plaintiffs as herein set forth, (b) taxes incurred as a result of the operation of other motor vehicles purchased from the respective plaintiffs and from others, (c) taxes for periods both prior and subsequent to the purchase of the aforesaid motor vehicles by Eastern from the plaintiffs, (d) taxes for periods prior to the repossession of said motor vehicles by plaintiffs which were assessed prior to such repossession, (e) taxes for periods prior to the repossession of said motor vehicles by plaintiffs which were assessed subsequent to such repossession, and (f) taxes for periods subsequent to the repossession of said motor vehicles by plaintiff International." **

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* Appellees concede that neither appellant could have limited its liability by filing appropriate returns as owner of the vehicles which were then being used by Eastern, and thus limiting its liability to the tax which accrued from the use of the vehicles which each owned. The Attorney General of New York ruled, on June 15, 1954, that neither conditional vendors nor chattel mortgagees could be taxed as the "owners" of the vehicles involved. Thus appellants are required to assume the responsibility for paying the greater tax assessed against all of the vehicular property of the carrier.

** Appellees now concede, however, that amounts included under (f)—i.e., tax liabilities of the carrier accruing after a conditional vendor repossesses a vehicle from a delinquent carrier—should not be included within the lien on that vehicle. See R. 28.

THE FEDERAL QUESTION IS SUBSTANTIAL

Eastern's tax liability arose from the operation of at least 15 tractors and trucks on the highways of New York for a period of over two years from January 1952 through February 1954. During this period, Eastern's vehicles traveled many miles on the roads of New York with consequent damage to the roads and benefit to Eastern. There is no doubt that the taxes paid by Eastern for use of the highways related directly to benefits received by Eastern. But during this period, neither of the appellants owned any vehicles operating for their profit on the highways of New York. Regardless of this, appellees are asserting a charge against each of the three vehicles owned by appellants, but operated for profit by Eastern, for the full amount of the taxes assessed against Eastern for the operation of all of its tractors and trucks during the entire two-year period.

We can safely start with the assertion that it is at least novel thus to seize a non-taxpayers's property to pay the unrelated taxes of a taxpayer. Eastern, the taxpayer, concededly had no property interest in the tractors at the time the lien was asserted; the tractors were the property of appellants. It is likewise stipulated that the charges assessed against appellants' property bear no relation either to the operation of appellants' tractors by Eastern, or to the equity interest which Eastern had in the tractors under the conditional sales contracts. In fact, most of the taxes in question had already accrued against Eastern before appellants' tractors were "even manufactured" (R. 37, See App. 1a).

The extraordinary nature of what has been sanctioned by the court below is perhaps best expressed by way of analogy. Let us assume that Eastern had owned 15 houses, and that International held a mortgage on

house No. 1. The water rents payable for house No. 1 would, of course, be a lien prior to International's mortgage. We doubt that it would be seriously urged, however, that the water rents on the other fourteen houses, after Eastern's failure to pay them, could validly become a lien on house No. 1 prior to International's mortgage. Yet, that is the claim here—that appellants, as conditional vendors of three tractors, can be compelled to pay the entire amount due from Eastern for the use of all of its other vehicles.

We do not deny the power of a state to seize any of a tax debtor's property to pay the tax debt. We do deny that a state may, as in this case, make a conditional vendor liable indiscriminately and without reference to the property concerned for all taxes accrued by a conditional vendee. Section 506, which purports to do so, we believe violates the Due Process clause of the Fourteenth Amendment.

Due process is concerned with whether a tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing state. *Ott* v. *Mississippi Barge Line Co.*, 336 U.S. 169. Although the older cases hold that the taxpayer must derive some direct benefit with respect to the assessment of property taxes, *Thomas* v. *Kansas City & Southern Ry. Co.*, 261 U.S. 481, the Court has come to require only that there must be "some relation" to the advantages or benefits to be secured. *Nashville C. & St. Louis Ry. Co.* v. *Walters*, 294 U.S. 405. The benefit need not be direct, but nevertheless the Court has not abdicated the position that there must be some benefit. *Myles Salt Co.* v. *Iberia Drainage Board*, 239 U.S. 478.

Article 21, as here applied to appellants, fails to meet that test. The purpose of Article 21 is to relate

the cost of repairing and maintaining roads more directly to those who contribute most to deterioration of the roads, and who presumably reap the greater share of their benefits. The very fact that the State of New York has seen fit to create this type of highway use tax, instead of continuing to pay for highway repairs out of more general levies, indicates that the State feels that the greatest benefits accrue to carriers. The stated purpose of Article 21 is to—

> "distribute more equitably [the] financial burden [of maintaining public highways] and to compensate the state in part for the privilege granted to such heavy vehicles of using the highways of the state and for the cost of administering state traffic regulations." (N. Y. Laws 1951, c. 74, § 1)

The benefit stemming from the imposition of the tax is thus derived by those who operate commercial vehicles for profit on the public highways of New York. Appellants are not in that category. Nor, as to them, may the tax be sustained on the ground that they derive a benefit in the sense that the business of selling tractors and trucks is dependent upon the maintenance of highways for the tractors and trucks to use. It might also be asserted that filling station and garage owners derive a similar benefit, since if there were no highways there would be no tractors and trucks to repair. In fact, of course, vendors and repairers of tractors and trucks would benefit more from less well-maintained highways which would hasten the deterioration of such vehicles. In short, the vendors of tractors and trucks receive no more benefit from the highway use tax than do hosts of others who are engaged in the wide variety of businesses which are today dependent on automotive transportation.

We do not doubt, of course, that the State of New York may support its public highway system by general taxation. When it abandons that pattern of taxation, however, and levies a specific use charge, the charge must reasonably relate to value received for use of the facilities charged for. *Ingels* v. *Morf*, 300 U.S. 290. So long as the tax is levied for highway purposes, it is "valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads". *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 547. Here, however, it is not even alleged that appellants have ever exercised the privilege of using the roads of New York at all. Appellants, in other words, who do not exercise the "privilege of using state roads" themselves, face the virtual confiscation of their three tractors to satisfy the tax liabilities of Eastern, most of which arose from Eastern's exercise of that privilege with a large fleet of trucks and tractors with which appellants had no connection whatever.

When a street is paved, the cost is apportioned and made a lien against the property which receives the benefits. Such a lien has priority over existing liens. But the mortgagee of one house cannot be compelled to pay the cost of paving the entire street simply because the mortgagors of all of the other houses fail to pay their proportionate share.

> "[A]ny attempt by a state to measure the tax on one person's property . . . by reference to the property . . . of another is contrary to due process of law as guaranteed by the Fourteenth Amendment." *Hooper* v. *Wisconsin*, 284 U.S. 206, 215; *Knowlton* v. *Moore*, 178 U.S. 41.

In an attempt to support this patent inequity, appellees assert the convenience of the State—an argument not unfamiliar in attempts to support unfair State action when it is challenged on due process grounds. The purpose of the enforcement provisions of Article 21 is of course to ensure that the highway use tax will not go unpaid—that it will be paid by someone. Aside from convenience, however, there is no connection between appellants' property and the amount of the lien. No doubt New York would find it less convenient to apportion the taxes by limiting the charges for unpaid highway use taxes to the property which Eastern possessed in the tractors at the time the taxes were assessed, or to the taxes which had actually accrued from the operation of the three vehicles. But convenience alone is no answer. Absent a definable benefit and a reasonable relation to appellants, their property may not be taken to satisfy New York's convenience. Indeed it can be added that the experience of other States with ton-mile highway use taxes illustrates that the enforcement provisions which are here challenged are not necessary to the collection of such a tax. Of the eleven States which impose such taxes,* apparently only New York has attempted a collection device which permits not only the manifest unfairness of the present case, but indeed would permit the same result had appellants allowed Eastern the use of the tractors as a mere gratuity.

Nor can appellees succeed in defending Article 21 by the assertion that the sovereign has the prerogative right of priority. *Shaffer* v. *Carter*, 252 U.S. 37. Only on a superficial view can the statute be said to enforce the State's prerogative right of priority. We assume

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* New York, Florida, Colorado, Alabama, Oregon, Ohio, Idaho, South Carolina, Wyoming, North Dakota and Michigan.

that the State of New York has exercised the full scope of its prerogative of priority, but that prerogative is concerned with seizure of a debtor's property subject to the interests of creditors. It is *not* concerned with the seizure of the property of the creditors themselves. Here the property belonged to appellants at the time the taxes were due and the liens attached. The decision in *Marshall* v. *New York*, 254 U.S. 380, of which much was said below, is wholly beside the point.

Finally, as already noted, the unfairness of the enforcement procedures which appellees seek to invoke is compounded by the additional fact that appellants could not learn of Eastern's tax deficiency. The secrecy provisions of Article 21 in effect when the claim against appellants was asserted (they have since been repealed; N. Y. Laws of 1955, c. 165, 193) made it legally impossible for a vendor to discover whether a prospective purchaser is in any sense delinquent in the payment of his taxes.

The issues here involved present substantial questions of paramount importance to industrial vendors of commercial vehicles in New York. Unless the prospective purchasers are able to make immediate payment in cash, the vendor becomes immediately liable for the purchaser's prior taxes. One mile of highway use by the vehicle, which involves a tax liability of less than one cent to the purchaser, can result in a practical tax liability to the vendor of many thousands of dollars.

Certainly vendors should not be required to sell for cash, or not at all, to avoid this liability. Normal and customary business practices in this industry require the retention of a security interest by vendors who do

not sell on a strictly cash basis. The statute in question, as construed by the holding below, effectively precludes the retention of such a security interest.

CONCLUSION

Appellants respectfully suggest that this appeal brings before this Court a Federal question which is far-reaching and important, both in terms of legal principles and of practical impact upon the vendors of commercial vehicles throughout much of the country; and that enough has been said to demonstrate that the question is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for proper resolution.

Respectfully submitted,

JOHN LORD O'BRIAN,
701 Union Trust Bldg.
Washington 5, D. C.
Counsel for Appellants.

May 1955

APPENDIX A

The Dissenting Opinion of Van Voorhis, J. in the New York Court of Appeals

Van Voorhis, J. (dissenting):

As conditional vendors of commercial motor vehicles, appellants' property in these vehicles has been destroyed through subordination to accumulated highway use taxes (Article 21 of the Tax Law) accruing with reference to other vehicles owned and operated by the conditional vendee, in many instances prior to delivery to the vendee of appellants' automotive equipment. Appellants could not have ascertained the tax liabilities of the vendee prior to sale, even if the books of the State Tax Commission had been open to them, inasmuch as the vendee had filed incorrect tax returns. A similar situation existed during the periods of time while appellants' motor vehicles were in the possession of the conditional vendee. Highway use taxes accruing with respect to the vehicles sold by appellants can be given priority over appellants' property interests in those vehicles, but it seems to me to constitute deprivation of property without due process of law and denial of the equal protection of the laws, to subject the recognized property interest of a conditional vendor to taxes which have accrued against the conditional vendee without reference to these vehicles, and in substantial part, before they were delivered to the conditional vendee or even manufactured. In voting to modify the judgment appealed from in these respects, I do not imply that some of the objects of this part of Article 21 of the Tax Law could not be realized by legislation giving effect to legitimate property rights of conditional vendors under such circumstances.

* * * * * * * * * *

Judgment affirmed. No opinion; all concur except Van Voorhis, J., who dissents in an opinion.

* * * * * * * * * *

APPENDIX B

THE OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

The parties have submitted this controversy upon a stipulated statement of facts pursuant to Section 546 of the Civil Practice Act. Plaintiffs ask for judgment that the tax lien priority asserted by defendants under Article 21 of the Tax Law (Highway Use Tax Law) be declared unconstitutional and invalid, and that certain bonds filed by them, under protest, to secure payment of such liens be cancelled and returned.

In 1953 International Harvester Company and Brockway Motor Company, Inc., sold three tractors to Eastern Cartage and Leasing Company, Inc. (herein referred to as Eastern), a carrier subject to the tax imposed by Article 21. The carrier owned at least fifteen motor vehicles as defined in the article. In each sale the vendor took a valid conditional sales agreement as a portion of the purchase price. Each vehicle became subject to Article 21. The conditional sales agreements pertaining to the two sales by International Harvester Company were duly assigned to plaintiff International. Plaintiff Brockway held the sales agreement taken by it. Eastern defaulted in making payments on all of the contracts and the several tractors were repossessed.

About April 21, 1954, defendants asserted that a lien in the amount of $3,698.04 attached to each of the three motor vehicles above mentioned. Such lien included all unpaid taxes, penalties and interest due from Eastern, including, in addition to taxes incurred as the result of the operation of those three vehicles, (a) taxes incurred by Eastern as the result of the operation of other vehicles purchased from plaintiffs and other vendors, (b) taxes for periods both prior and subsequent to the purchase of the three specified vehicles from these plaintiffs, (c) taxes for periods prior to plaintiffs' repossession of the three vehicles assessed prior to the repossession, (d) taxes for periods prior to repossession assessed after such repossession, and (e) taxes subsequent to the repossession of the vehicles by International. The Brockway truck remained in the possession of that company. International sold its tractors to third parties. Plaintiffs have been permitted to file bonds to obtain the release of the trucks from the liens.

This court affirmed the validity of Article 21 in *Mid-States Freight Lines, Inc. v. Bates* (279 App. Div. 454, *aff'd.* without opinion, 304 N. Y. 700, *cert. den.*, 345 U.S. 908). This controversy involves the application of the lien priority imposed by section 506 thereof.

Section 505 requires every subject carrier to file with the tax commissioner "on or before the twentieth day of each month a return for the preceding calendar month during which any vehicular unit was operated in this state * * *." Section 506 directs that each carrier shall pay the required tax at the time of filing the return and provides that "The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit."

The sum of plaintiffs' contention is that such lien priority denies them the equal protection of the law, subordinates their liens, and takes their property without due process unreasonably and arbitrarily. They assert that this is done to satisfy Eastern's tax obligation to pay for highway use by its other vehicles, which includes the tax obligation which had accrued before Eastern purchased and used plaintiffs' vehicles and a similar obligation accruing after the repossession of the vehicles by plaintiffs. We believe that the basic issue here is, as defendants argue, whether the State may secure its prerogative right to the payments of its taxes by making that right paramount to plaintiffs' security for their private debts. The other matters discussed relate themselves to that issue.

The prerogative right of priority of payments of debts due it from an insolvent over those due private creditors exists in the State as the successor of the Crown. The common law gave the king such preference. By virtue of our 1777 Constitution that part of the common law continued to be the law of this State. Later Constitutions have, in effect, retained that provision. The priority arises and exists independently of statute. (*Matter of Carnegie Trust*

Company, 206 N. Y. 390, 396, 397; *Matter of Gruner*, 295 N. Y. 510, 522, 523; *Marshall* v. *New York*, 254 U.S. 380, 382-384.) "The only changes of the right made by statute have been by way of enlarging its scope in certain cases. Thus, while by the common law of England * * * the priority does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the legislature of New York extended the prerogative right so as to give certain taxes priority over prior encumbrances. An extension of this nature is found in Section 197 of the Tax Law * * *. By reason of that provision the annual franchise tax takes priority over encumbrances on the corporate property." (*Marshall* v. *New York*, *supra*, pp. 383, 384.)

The power to declare the lien of the tax paramount to all prior liens and encumbrances and to the rights of a holder of the legal title of the motor vehicle is beyond question. It is not unreasonable or arbitrary to fix upon the carrier's motor vehicles as subject of the lien. That provision is a corollary to and a necessary implementation of the mechanics of a fundamental right of priority.

The tax is imposed on the carrier as he avails himself of the use of the State's highways. It is determined by the extent of that use, irrespective of the number of trucks employed. If he fails to pay the tax, recourse may be had to his property, a common and recognized procedure. Sound reason justifies the method of enforcing the payment of the tax adopted in this statute. It could well happen that trucks constitute the sole tangible resources of a carrier. The nature of the ownership and possession of trucks is transient. It would be neither safe, practicable nor reasonable to apportion the lien of an unpaid tax on the basis of each of several vehicles' actual use of the highway. Such a prorating or subdivision is no more to be expected than where a state seeks to collect an income tax from a non-resident by enforcing payment of the tax and considering his property and business interests in the state as a single entity in order to enforce payment of the tax by lien thereon. (*Shaffer* v. *Carter*, 252 U.S. 37, 59.) In that case, adverting to the probability of changes in the units of the individual taxpayer's property and business, Mr. Justice Pitney said, "The entire jurisdiction of the state over appellant's property and business and the income he derives from them * * * is a jurisdiction in rem; and we are clear that the state acted within its lawful

power in treating his property interests and business as having *both unity and continuity.* (Emphasis supplied.)

Plaintiffs' contention of the invalidity of the statute because it has no provision for notice of assessment of tax deficiencies and provides for seizure and sale of vehicles without notice (Section 511; Subds. 3) to parties situated as are plaintiffs ties into their criticism of the statutory secrecy accorded returns required by the statute (Section 514).

As a basic proposition every presumption is in favor of the validity of a statute. The tax imposed by Article 21 has been determined to be a valid tax: (*Mid-States Freight Lines, Inc.*, v. *Bates, supra.*) The power of the State to establish priority for tax debts due it cannot be questioned. Entire exactitude in the application of taxes, while a desirable goal, cannot always be attained. Here the plaintiffs point out dire possibilities of unequal exactions. On the record before us we cannot say that the plaintiffs' trucks constitute the sole fund from which Eastern's tax liability may be satisfied in the event Eastern cannot pay its own debt. It does not indicate whether the lien of the tax has been asserted against other motor vehicles of Eastern. It does not indicate that Eastern is insolvent or in receivership, though that might be a reasonable assumption.

In any event the unconstitutionality of a law is not to be determined solely on the ground that some hardship may result from its application. (*New York Rapid Transit Corp.* v. *City of New York*, 275 N.Y. 258, 265, 266.) In measuring its validity it is not reasonable to assume that the tax authorities will enforce it in such a manner as to produce uncalled-for hardship or inequity. Conversely, Mr. Justice Holmes has said (*Gast Realty & Investment Company* v. *Schneider Granite Company*, 240 U.S. 55, 58, 59), "But * * * if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

The parties are in proper agreement in one respect. The law does not bar a conditional vendor from repossessing a motor vehicle subject to the State's lien or impose a lien on such a chattel for taxes accruing after its repossession.

It is urged that the assertion of the paramount lien will

raise obstacles to the widespread commercial dealings in motor trucks. That is not sufficient to divest the State of the exercise of its power. Some of the problems suggested by plaintiffs in this respect related to the "secrecy" proceedings could be solved by administrative action or by suitable legislation for furnishing information of tax liabilities and amounts thereof to persons dealing in trucks.

The judgment should be granted to defendants in accordance with the submission, except as to taxes accrued after repossession of the respective trucks by the plaintiffs, without costs.

Judgment granted to the defendants according to the submission, except as to taxes accrued after repossession of the respective trucks by the plaintiffs, without costs.

Settle the form of judgment on notice.

APPENDIX C

NEW YORK TAX LAW, ARTICLE 21, SECTIONS 503 AND 506

§ 503. IMPOSITION OF TAX

In addition to any other tax or fee imposed by law, there is hereby levied and imposed a highway use tax for the privilege of operating any vehicular unit upon the public highways of this state. Such tax shall be upon the carrier except that where the carrier is not the owner of such vehicular unit, the tax shall be a joint and several liability upon both. Such tax shall be based upon the gross weight of each vehicular unit and the number of miles it is operated on the public highways in this state except as hereinafter provided. The tax for each such vehicular unit shall be computed by multiplying the number of miles operated on the public highways in this state by the appropriate weight group tax rate as it appears in the following table. When a vehicular unit is operated without any load whatsoever, the carrier shall pay the tax imposed by this section only upon the actual weight of the vehicular unit for the mileage such unit is operated without load or cargo, computed at the appropriate weight group tax rate in the following table: [Table omitted]

§ 506. PAYMENT OF TAX

At the time of filing a return, as required by this article, each carrier shall pay to the tax commission the tax imposed by this article for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed. The tax commission may grant a reasonable extension of time for paying the tax whenever good cause exists.

The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit.

REMITTITUR. December 31, 1954

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of December in the year of our Lord one thousand nine hundred and fifty-four, before the Judges of said Court.

WITNESS,

The HON. EDMUND H. LEWIS, Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

No. 250

INTERNATIONAL HARVESTER CREDIT CORPORATION & ANO.,
Appellants,

vs.

ALLEN J. GOODRICH, & ORS., constituting the State Tax Commission of the State of New York, *Respondents.*

BE IT REMEMBERED, That on the 25th day of August in the year of our Lord one thousand nine hundred and fifty-four, International Harvester Credit Corporation & ano., the appellants in this cause, came here unto the Court of Appeals, by DeGraff, Foy, Conway & Holt-Harris, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Allen J. Goodrich, & ors, constituting the State Tax Commission of the State of New York, the respondent, in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. John T. DeGraff, of counsel for the appellants, and by Mr. Henry S. Manley, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof; &c.

S/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, December 31, 1954.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

S/ RAYMOND J. CANNON
Clerk

(SEAL)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

INTERNATIONAL HARVESTER CREDIT CORPORATION, ET AL., *Appellants*,

vs.

ALLEN J. GOODRICH, ET AL., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 82

INTERNATIONAL HARVESTER CREDIT CORPORATION, ET AL., *Appellants*,

v.

ALLEN J. GOODRICH, ET AL., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The New York Court of Appeals reviewed and affirmed without a majority opinion the judgment of the Appellate Division of the Supreme Court of New York. The dissenting opinion of the New York Court of Appeals appears at R. 20. The opinion of the Appellate Division of the Supreme Court of New York (R. 12) is reported at 284 App. Div. 604, 132 N.Y.S. 2d 541.

JURISDICTION

Pursuant to Section 546 of the New York Civil Practice Act, this controversy was submitted on a stipulated statement of facts to the Appellate Division of the Supreme Court of the State of New York, Third Department, on June 8, 1954 (R. 1-10). Appellants' contention, as stated in that Submission and Statement of Facts (R. 6-8), included the claim that Section 506 of Article 21 of the New York Tax Law was invalid and unenforceable under the Fourteenth Amendment of the United States Constitution. The Appellate Division passed on this question and held that the provision in question was valid under the United States Constitution (R. 12, 16). An appeal to the New York Court of Appeals was taken as of right, under Section 588(1) of the New York Civil Practice Act, on the ground that the case directly involved the construction of the United States Constitution (R. 11). The Court of Appeals affirmed (R. 21).

The judgment of the Court of Appeals was entered on December 31, 1954 (R. 21). The jurisdiction of this Court to review said judgment is conferred in Title 28, United States Code, Section 1257(2). On March 18, 1955, notice of appeal to this Court was served on appellees and filed in the Appellate Division of the Supreme Court of New York, Third Department (R. 24). This Court noted probable jurisdiction of the appeal on October 10, 1955 (R. 25).

QUESTION PRESENTED

Whether Article 21 of the Tax Law of the State of New York imposing a highway use tax is consistent with the Due Process clause of the Fourteenth Amendment of the Constitution to the extent that it author-

izes in Section 506 the taking of appellant's property in vehicles, of which it was the conditional vendor to an operating carrier and taxpayer, to satisfy all fees, taxes, penalties and interest accruing against the operating carrier, without regard to the origin of such tax liabilities or the identity of the vehicles by the use of which the tax liabilities were created.

STATUTES INVOLVED

New York Tax Law, Article 21.

§ 503. Imposition of Tax

In addition to any other tax or fee imposed by law, there is hereby levied and imposed a highway use tax for the privilege of operating any vehicular unit upon the public highways of this state. Such tax shall be upon the carrier except that where the carrier is not the owner of such vehicular unit, the tax shall be a joint and several liability upon both. Such tax shall be based upon the gross weight of each vehicular unit and the number of miles it is operated on the public highways in this state except as hereinafter provided. The tax for each such vehicular unit shall be computed by multiplying the number of miles operated on the public highways in this state by the appropriate weight group tax rate as it appears in the following table. When a vehicular unit is operated without any load whatsoever, the carrier shall pay the tax imposed by this section only upon the actual weight of the vehicular unit for the mileage such unit is operated without load or cargo, computed at the appropriate weight group tax rate in the following table:

[Table omitted]

§ 506. Payment of Tax

At the time of filing a return as required by this article, each carrier shall pay to the tax commission the tax imposed by this article for the period covered

by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed. The tax commission may grant a reasonable extension of time for paying the tax whenever good cause exists.

The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit.

STATEMENT

The stipulated statement of facts upon which the controversy was submitted (R. 1-10) may be summarized as follows:

In 1953, International Harvester Company and appellant Brockway Motor Company, Inc. (hereafter Brockway) sold three tractors (i.e., the automotive portion of a tractor-trailer) to Eastern Cartage and Leasing Co., Inc. (hereafter Eastern) (R. 3, 4, 5). In each sale, appellants took a valid conditional sales agreement, reserving the title in the vehicles in themselves as security for payment of the purchase price. The conditional sales contracts were duly filed, according to law, in the office of the Clerk of the Town of Rotterdam, Schenectady County, New York (R. 3, 4, 5). The conditional sales agreements pertaining to the two tractors sold by International Harvester Company were assigned to appellant International Harvester Credit Corporation (hereafter International) (R. 3, 5).

On January 22, 1954, International replevied the two tractors from Eastern for default in payment of the balance then due, amounting to $4,578.79 on each tractor (R. 3, 5). Both tractors were repossessed and purchased at public sale by International on February 16, 1954, for $3,500 each (R. 3, 6). On March 26, 1954, Brockway repossessed the tractor which it had sold to Eastern for default in the payment of $5,625 (R. 4). It is stipulated that the value of this tractor at the time of repossession did not exceed $5,625 (R. 4). On March 17, 1954, International sold one of the tractors to Philomena Colafemina of Schenectady, New York, and warranted that the tractor was free from any charge or encumbrance (R. 3). On the same day, International sold the other tractor to a Massachusetts corporation for operation outside the State of New York (R. 6). Brockway still possesses the tractor which it repossessed from Eastern (R. 4).

More than a month later, on April 21, 1954, appellees, constituting the State Tax Commission of the State of New York (R. 1), for the first time, asserted that a lien amounting to $3,698.04 attached to each of the two tractors then in the State of New York and to the $4,300 which International had received in payment for the tractor which had been sold to the Massachusetts corporation (R. 4). It subsequently developed that Eastern, a carrier subject to the highway use tax imposed by Article 21 of the New York Tax Law, had become delinquent in filing its return and paying its taxes both before and after its purchase of the three tractors from appellants, and that, due to its entire course of operations from January 1952 to February 1954, Eastern was liable for taxes, penalties and interest aggregating $3,698.04 (R. 4). These taxes were levied on Eastern for the operation of at least fifteen motor vehicles on the public highways (R. 4). At the time

of the conditional sale of the three tractors by appellants to Eastern, appellees had taken no action with respect to the taxes in question.

Article 21 of the New York Tax Law imposes a highway use tax "for the privilege of operating any vehicular unit upon the public highways" of New York. Sec. 503. This use or privilege tax is imposed "upon the carrier except that where the carrier is not the owner . . . the tax shall be a joint and several liability upon both the owner and the carrier." Sec. 503. The highway use tax is measured by the number of vehicles and the weight and amount of highway use of each vehicle. The carrier and the owner are under a duty to keep records and make returns. Failure to fulfill such duties calls for the imposition of penalties. At all times here relevant, it was further required that all reports and returns made under Article 21 be kept secret, as is the lien which is not required to be filed or recorded. Sec. 514. Thus it was impossible for appellants to have had any knowledge of Eastern's tax delinquency at the time of the conditional sales by them to Eastern.

All taxes, fees, penalties and interest become a prior lien upon every vehicle operated by the delinquent carrier. The lien attaches to any vehicle the moment it is operated on the public highway by the carrier. Thus, once the tax accrues as to any vehicle operated by the carrier, it becomes a prior charge upon all vehicles operated by the carrier irrespective of ownership. The lien is expressly made "paramount to all prior liens and encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit." Sec. 506.

Appellees concede that neither appellant could have limited its liability by filing appropriate returns as

owner of the vehicles which were then being used by Eastern, thus limiting its liability to the tax which accrued from the use of the vehicles which each owned. The Attorney General of New York ruled, on June 15, 1954, that neither conditional vendors nor chattel mortgagees could be taxed as the "owners" of the vehicles involved.

According to the stipulation of facts (R. 4), the amount of the lien asserted against each of the three tractors owned by appellants includes:

> "(a) taxes incurred as a result of the operation of the three motor vehicles purchased from the respective plaintiffs as herein set forth, (b) taxes incurred as a result of the operation of other motor vehicles purchased from the respective plaintiffs and from others, (c) taxes for periods both prior and subsequent to the purchase of the aforesaid motor vehicles by Eastern from the plaintiffs, (d) taxes for periods prior to the repossession of said motor vehicles by plaintiffs which were assessed prior to such repossession, (e) taxes for periods prior to the repossession of said motor vehicles by plaintiffs which were assessed subsequent to such repossession, and (f) taxes for periods subsequent to the repossession of said motor vehicles by plaintiff International."*

SUMMARY OF ARGUMENT

Appellants do not question the power of a state to impose a prior lien for use taxes attributable to the use of their property. However, appellants do assert that the giving of priority to a lien for completely unrelated use taxes necessarily results in an unconstitu-

* Appellees now concede, however, that amounts included under (f)—i.e., tax liabilities of the carrier accruing after a conditional vendor repossesses a vehicle from a delinquent carrier—should not be included within the lien on that vehicle. See R. 16.

tional taking of appellants' property to the extent the lien is for delinquent taxes on the property of a third person.

The arbitrariness of the charge which results in a taking of appellants' property cannot be sustained by the invocation of a state's prerogative right of lien priority. The issue is not priority but the reasonableness of what was made prior. Nor can such a taking be sustained on the ground that either public good was served thereby or that the person whose property was taken had notice, consented or received some benefit. Such has been the result in decisions in other states, and such is the teaching of the decisions of this Court.

ARGUMENT

There are only a few salient facts which must be kept in mind. First, it is significant that the charges in question arose from the operation by Eastern of at least fifteen tractors and trucks on the highways of New York for a period of over two years from January 1952 through February 1954. These are the charges which appellees now assert may be imposed on each of the three vehicles owned by appellants—the full amount of the taxes assessed against Eastern for all of its highway operations during the entire two year period.

Second, it is equally significant that appellees are undertaking to seize a non-taxpayer's property to pay the unrelated taxes of a taxpayer. Eastern, the taxpayer, concededly had no property interest in the tractors at the time the lien was asserted; the tractors were the property of appellants. It is further conceded that the only property interest which Eastern ever had in the property was the right of possession

and the right to use the tractors. It is also stipulated that the charges assessed against appellant's property bear no relation either to the operation of appellants' tractors by Eastern or to the equitable interest which Eastern had in the tractors under the conditional sales contract. Finally, it is admitted that the charges in question grossly exceed the taxes for which appellants would have been liable had they actually operated their tractors during the entire period in question. In fact, most of the taxes in question had already accrued against Eastern before appellants' tractors "were even manufactured" (R. 31).

The somewhat fantastic nature of what has thus been sanctioned by the court below is perhaps best expressed by way of analogy. Assume that Eastern had owned 15 houses, and that International held a mortgage on house No. 1. The water rents payable for house No. 1 would, of course, be a lien prior to International's mortgage. The decision below, however, would suggest that the water rents on the other fourteen houses, after Eastern's failure to pay them, could become a valid lien on house No. 1 prior to International's mortgage. The claim here, similarly, is that appellants, as conditional vendors of three tractors, can be compelled to pay the entire amount due from Eastern for the use of all its other vehicles. We submit that the claim cannot be sustained.

There is no doubt as to the validity of a statute imposing liability on the owner of a vehicle for damage done by another operating the vehicle. However, were Eastern to have rented vehicles from both appellants and another, it requires more than credulity to assert that appellants' vehicle could be taken for damages inflicted by Eastern while operating the vehicle rented

from another. So far as is known, aside from the holding below, there are no decisions or statutes which sanction a result so in conflict with reason and proprietary fairness.

It is difficult to know how to pose the question in order to discuss the matter from a constitutional point of view. It is unrealistic to say that a tax liability is involved since the Attorney General of New York has ruled that appellants as conditional vendors cannot be taxed as the owners of the tractors involved under the provisions of Section 503, which subjects an owner to liability for the tax jointly and severally with an operating carrier other than the owner. It is even more difficult to view the charge in question as a matter of lien priority. Although this question is not free of doubt (see *In re Grunier*, 295 N.Y. 510, 68 N.E. 2d 514), we assume that the State of New York can exercise and has exercised the full scope of its prerogative of tax lien priority. That prerogative, however, involves the payment of taxes assessed against a debtor's property to an amount not in excess of the value of the interest of the debtor in such property. The seizure of debtor's property subject to the interest of the creditor is to be contrasted with the seizure of the property of the creditors themselves. The latter amounts to a taking of property. Viewed as a taking of property, the charges here are valid only if the use of the property is illegal or against public policy, or some compensation in the nature of a benefit has been awarded appellants, or the implied consent of appellant can be said to have been obtained. *Van Oster* v. *Kansas*, 272 U.S. 465; *Provident Institution for Savings* v. *Jersey City*, 113 U.S. 506; *Dunbar* v. *City of New York*, 251 U.S. 516; *Lindsay & Phelps Co.* v. *Mullen*, 176 U.S. 126.

I. Article 21 of the New York Tax Law, as here applied, fails to meet the test of due process

Due process is concerned with whether a tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing state. *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169. Although the older cases hold that the taxpayer must derive some direct benefit with respect to the assessment of property taxes, *Thomas* v. *Kansas City Southern Ry. Co.*, 261 U.S. 481, the Court has come to require only that there must be "some relation" to the advantages or benefits to be secured. *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405. The benefit need not be direct, but nevertheless the Court has not abdicated the position that there must be some benefit. *Wyles Salt Co.* v. *Iberia Drainage Board*, 239 U.S. 478.

Article 21, as here applied to appellants, fails to meet that test. The purpose of Article 21 is to relate the cost of repairing and maintaining roads more directly to those who contribute most to deterioration of the roads, and who presumably reap the greater share of their benefits. The very fact that the State of New York has seen fit to create this type of highway use tax, instead of continuing to pay for highway repairs out of more general levies, indicates that the State feels that the greatest benefits accrue to carriers. The stated purpose of Article 21 is to—

> "distribute more equitably [the] financial burden [of maintaining public highways] and to compensate the state in part for the privilege granted to such heavy vehicles of using the highways of the state and for the cost of administering state traffic regulations." (N.Y. Sess. Laws 1951, c. 74 § 1)

The benefit stemming from the imposition of the tax is thus derived by those who operate commercial vehicles for profit on the public highways of New York.

Appellants are not in that category. Nor, as to them, may the tax be sustained on the ground that they derive a benefit in the sense that the business of selling tractors and trucks is dependent upon the maintenance of highways for the tractors and trucks to use. It might also be asserted that filling station and garage owners derive a similar benefit, since if there were no highways there would be no tractors and trucks to repair. In fact, of course, vendors and repairers of tractors and trucks would derive more benefit from less well-maintained highways which would hasten the deterioration of such vehicles. In short, the vendors of tractors and trucks receive no more benefit from the highway use tax than do hosts of others who are engaged in the wide variety of businesses which are today dependent on automotive transportation.

Of course, the State of New York may support its public highway system by general taxation. When it abandons that pattern of taxation, however, and levies a specific use charge, the charge must have a reasonable relationship to value received for use of the facilities charged for. *Ingels* v. *Morf*, 300 U.S. 290. So long as the tax is levied for highway purposes it is "valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 547. Here, however, it is not even alleged that Appellants have ever exercised the privilege of using the roads of New York. Appellants, in other words, who do not exercise the "privilege of using state roads" them-

selves, face the virtual confiscation of their three tractors to satisfy the tax liabilities of Eastern, most of which arose from Eastern's exercise of that privilege with a large fleet of trucks and tractors with which appellants had no connection whatever.

A related question was faced by this Court in *Lindsay & Phelps Co.* v. *Mullen*, 176 U.S. 126, 143. There the issue presented was "whether the [property] of one party [could] be subjected to a lien for surveying and scaling not only his own [property], but also for surveying and scaling [property] belonging to other parties." According to the Court, "the statement naturally suggests a negative answer, and ordinarily it may be affirmed that no man's property can be subject to a lien for services rendered upon some other man's property." In spite of the negative suggestion, the Court upheld the lien by using the fictions of imputing ownership of the property to the lienor, and implying the consent of the actual owner, as well as finding public necessity in the prevention of injury to life and property. The use of such a finding or the application of such fictions to appellants in the instant case involves such a game of will-o'-the-wisp that the courts below did not attempt it.

II. The lien provisions of Article 21 cannot be sustained on the ground that they are necessary for the collection of the highway use tax

There has been no discernible finding by either the Courts or the legislature that public necessity is involved in the lien provisions. Rather, the attempt to support them is based on the mere convenience of the State—an assertion not unfamiliar in attempts to sup-

port unfair state action when it is challenged on due process grounds.

The purpose of the enforcement provisions of Article 21 is of course to insure that the highway use tax will not go unpaid—that it will be paid by someone. Aside from convenience, however, there is no connection between appellants' property and the amount of the lien. No doubt New York would find it less convenient were it required to apportion the taxes to the property which Eastern possessed in the tractors at the time the taxes were assessed, or to the taxes which had actually accrued from the operation of the three vehicles. But inconvenience alone is no answer. Absent a definable benefit and a reasonable relation to appellants, their property may not be taken to satisfy New York's convenience.

Certainly the argument made by appellees that such a provision is valid on the ground that it is necessary in order to insure the collection of use taxes is not borne out by the experience of other states. Of the states which impose highway use taxes only New York has attempted a collection device which permits not only the manifest unfairness of the present case, but indeed would permit the same result had the appellants allowed their trucks to be used gratuitously.

Of fifteen states* which presently have highway use tax provisions, eight have accompanying lien provisions and of those only three give the lien priority. Five states have lien provisions which attach to property other than that of the taxpayer. Only two states—Oklahoma and New York—have prior lien provisions which attach to property other than that of the de-

* See Appendix A.

linquent taxpayer. However, the Oklahoma lien provision differs materially from that of New York in that the lien which Oklahoma asserts is limited to the amount of unpaid taxes accrued by the individual vehicle while the New York lien purports to place a prior lien on the vehicle for all delinquent highway use taxes without regard to the amount of taxes attributable to the individual vehicle to which the lien attaches.

There is no question as to the validity of those statutes which place a prior lien on a vehicle for the use taxes attributable solely to the vehicle involved without regard to ownership. Nor do appellants deny the validity of the lien provisions of those states which place a lien for all the use taxes of a delinquent carrier on a single vehicle if the lien is not made paramount to the property of the non-taxpayer owner. However, a combination of the two results in the taking of property rights without adequate compensation and without bestowing a reasonably related benefit.

If the present lien provision can be justified on the ground of convenience, we can see no reason why, for convenience sake, the lien provision could not be extended to cover all of the taxes which a taxpayer owes the State. Except for the name given the tax, there is no more relationship between the taxes the appellees are trying to collect by the sale of these vehicles and other types of taxes which Eastern may owe the State. Convenience, without more, would dictate that the liens for Eastern's unpaid taxes be placed on all of appellants' property, personal and real.

The state courts which have considered the property interest of conditional vendors in relation to an at-

tempt by the state to levy on the property for the delinquent taxes of conditional vendees have, with a single exception, protected the vendors' interest.

In *Pacific Finance Corp. v. Snohomish County*, 160 Wash. 384, 295 Pac. 110, 112, the State had seized for the vendee's unpaid taxes a vehicle sold under a conditional sales contract. After the vehicle had been seized, but prior to its sale, the vendor repossessed. The Supreme Court of Washington, held that the vehicle could not be sold to satisfy the vendee's taxes. A recent case reaches the same result under the Federal tax lien provision. *United States v. Anders Contracting Co.*, 111 F. Supp. 700 (W.D.S.C.).

Universal Credit Co. v. Mamminga, 214 Ia. 1135, 243 N.W. 513, 514 is directly in point. In that case the conditional vendor had repossessed a vehicle prior to the State's seizure of the truck for the delinquent highway use taxes of the conditional vendee. The Iowa Supreme Court, after expressly reserving pronouncement with respect to the constitutionality of the lien provision, held that the vehicle could not be sold by the state to satisfy the delinquent taxpayer's taxes. As phrased by the Iowa Supreme Court, the question revolved around the nature of the property interest which the taxpayer had in the vehicle. That is to say, "to what 'property' could the tax lien attach? . . . [A]ssuming that the purchase price of the truck was $1,500, and that the motor carrier had paid only $500 on the purchase price under the conditional sales contract, could the tax in question be enforced against the truck itself and sale thereof, or could said tax and penalty be enforced only against the interest which the motor carrier had in said truck?" The Iowa Supreme Court concluded that since the truck had been repossessed

by the conditional vendor prior to the time the state attempted to assert its lien, the conditional vendee had no interest in the truck which could be reached to satisfy its delinquent use taxes and the truck could not, therefore, be reached by the lien.

The single exception to the above line of cases construed the statutory lien provisions of the Kansas highway use tax, which have now been repealed. The case in question is *Freuhauf Trailer Co. v. State Corp. Comm.*, 149 Kan. 465, 87 P.2d 641. Aside from the fact that the Kansas statutory lien provisions have been repealed,* the *Freuhauf Trailer* case is distinguishable on the ground that in Kansas a conditional sales contract is construed as the equivalent of a chattel mortgage, thus leaving the vendor with nothing more than a security interest in the property. A more important distinction lies in the fact that in the *Freuhauf Trailer* case the state had asserted the lien prior to the default by the vendee and repossession by the vendor. Even on the facts of the *Freuhauf Trailer* case, however, it is submitted that the Kansas Supreme Court went astray; and that the "dubitante" opinion by the Chief Justice, which would have limited the lien to taxes actually accrued by the vehicle, reached the correct result.

III. VIEWED AS EITHER AN ASSESSMENT OR A LIEN, THE LIEN PROVISIONS OF ARTICLE 21 RESULT IN AN ARBITRARY AND UNREASONABLE TAKING OF APPELLANTS' PROPERTY.

While moneys raised by general taxation may constitutionally be applied to purposes from which the

* One may conjecture whether the virulent construction placed on the lien provision by the majority of the Kansas Supreme Court did not result in a repeal by the Kansas legislature on constitutional grounds.

individual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & Southwestern Ry. Co. v. Nattin*, 277 U.S. 157, 159; *Memphis & Charleston Ry. Co. v. Pace*, 282 U.S. 241, 246; so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. *Myles Salt Co. v. Iberia Drainage Board*, 239 U.S. 478; *Gast Realty Co. v. Schneider Granite Co.*, 240 U.S. 55; *Kansas City So. Ry. Co. v. Road Imp. Dist. No. 6*, 256 U.S. 658; *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 429.

It is also true that some taxes, like those on corporate franchises, cannot be broken down and attributed to the separate items of property possessed by the corporation. *New York Terminal Co. v. Gaus*, 204 N.Y. 512, 98 N.E. 11. This may also be true of moneys expended by the State to remove a grade crossing. *New York v. Gebhardt*, 151 F.2d 802 (2d Cir.). Unlike these taxes and claims, the highway use tax is simply and accurately apportioned to the last mill, according to the measure of benefit received. When the tax is for benefits conferred by the State, and especially when the formula for ascertaining the proportion of benefit is clear, this Court has insisted that the State limit its claim to the amount which may properly be apportioned to the property to be charged. *Myles Salt Co. v. Iberia Drainage Board*, 239 U.S. 478; *Southern Ry. Co. v. Kentucky*, 274 U.S. 76.

Under the Constitution, "the public is denied the *power* to make a special assessment where no benefit is conferred, and therefore benefit is a necessary predicate to exercise of such power, and without it there is no foundation for the assessment and no jurisdiction

to make it." *Falor* v. *Moug*, 47 Ohio App. 942, 191 N.E. 445, 447.

Since the New York highway tax lien is not concerned with seizure of property of the tax debtor or with the tax liability of the owner of the property which was seized, it is difficult to see how the decision in *Marshall* v. *New York*, 254 U.S. 380, 382, of which much was said below has anything to contribute in the way of support for appellees' position. There as stated by Mr. Justice Brandeis, the Court was not presented with any question "as to the priority of the State over incumbrances. The single question . . . presented [was] whether the State of New York [had] priority in payment out of the general assets of the debtor over other creditors whose claims are not secured by act of the parties nor accorded a preference, by reason of their nature, by the state legislature or otherwise." The final sentence of the opinion affirms this distinction for it was not there "sought to gain priority over a lien existing at the time when the receiver was appointed; and the priority over unsecured creditors is granted by the common law of New York."

The holding of the court below was epitomized in the assertion that "[t]he power of the State to establish priority for tax debts due it cannot be questioned." (R. 16) Thus characterized as a matter of priority and coupled with a tax bearing no relation to the property taken, the rights of the tax collector are vastly greater than those which Eastern would have had against its creditors. Purely as a matter of priority the Court was in error; for the "rights of the collector [can] rise no higher than those of the taxpayer." *United States* v. *E. Regensburg & Sons*, 124 F. Supp. 687 (S.D.N.Y.); *United States* v. *Winnett*, 165 F.2d 149

(9th Cir.); *Karoo-Smith Co.* v. *Maloney*, 112 F. 2d 690 (3d Cir.).

The "power" accorded by Section 506 of Article 21 of the New York Tax Law assumes that the State may deal with the property of appellants as it would with the property of Eastern, the delinquent taxpayer. This assumption, as we have shown, is not made out of necessity. Other states have succeeded in administering and collecting highway use taxes without resort to such a scheme. The raison d'être here therefore, must be nothing more than convenience in collecting the use tax.

Appellants acknowledge that property rights have come to be less protected by due process than have rights regarded as more personal in nature. However that may be, appellants have been unable to find in any opinion by this Court an inference that property rights may be as whimsically and arbitrarily dealt with as theirs have been. According to Mr. Justice Story, so-called priority cannot "divest a specific lien, attached to a thing, whether it be accompanied by possession or not. . . . And before such a decision is made, it will deserve very grave deliberation. . . ." *Conard* v. *Atl. Ins. Co. of N. Y.*, 1 Pet. 386, 441. Much graver is the deliberation when the divestiture of property rights is so unreasonable that mere convenience is its sole support.

According to the admonition contained in the opinion below (R. 16), if "the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact." *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U.S. 55, 58, 59. In spite of this, the holding was that "the constitutionality of a

law is not to be determined solely on the ground that some hardship may result from its application." (R. 16) But as this Court has said in a similar situation, we are not dealing here with probabilities but with "resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without compensating advantage of any kind." *Myles Salt Co.* v. *Iberia Drainage Board*, 239 U.S. 478, 485.

In cataloguing the outermost constitutional bounds with respect to the power of the States to derogate from mortgage security, Mr. Justice Cardozo acknowledged that even the invocation of public welfare would not serve as an excuse for the unnecessary and arbitrary confiscation of the mortgagees' property. His comments are significantly appropriate here:

> "With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor; [and so] . . . . viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60, 62.

The cases decided by this Court which bear a marked similarity to the present case demonstrate clearly the invalidity of the highway use tax lien. In *Hooper* v. *Wisconsin*, 284 U.S. 206, the State tried to measure the tax liability of the head of a family by the total of the sums earned by him and by his wife and children.

Despite the argument that this money was really one income, used for one integrated family group, and that the head of the family derived a substantial benefit from it, this Court held that the tax violated due process. In its opinion, this Court quoted, with approval, the following language from *Knoxville* v. *Water*, 178 U.S. 41, 77:

> "'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'" 284 U.S. at 215.

This Court went on to say:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income." (ibid.)

In *Southern Ry. Co.* v. *Kentucky*, 274 U.S. 76, the State undertook to measure the tax on a railroad wholly within Kentucky by reference to the income of connecting lines owned and operated by the same parent corporation, and represented as an integrated system in the schedules and advertising of the parent. This Court decided that such an apportionment violated due process because of the arbitrary manner in which

it attributed earnings of the whole system to the tax payer railroad.

In *Myles Salt Co. v. Iberia Drainage Board*, 239 U.S. 478 a drainage district was created which included within its boundaries an island which required no drainage. This Court held that since the island did not and could not benefit, the attempt to tax it for drainage facilities constructed for the benefit of other property was an unconstitutional confiscation.

There is no difference between the effect of the statutes declared void in these cases and the effect of the statute here questioned. The latter seeks to impose a tax burden on appellants which is measured by Eastern's use of the highways by its entire fleet of fifteen vehicles. Surely such a statute must be considered to violate the "fundamental conceptions which underlie our system". *Hooper v. Wisconsin*, 284 U.S. 206, 215.

To the same effect is *Rapid Ry. Co. v. Schroeder*, 190 Mich. 684, 157 N.W. 422, in which the Michigan Supreme Court ruled unconstitutional a taxing statute which purported to tax one unit of a group of railways, owned and operated by the same company, on the basis of the property owned by other units in the system. Here again, there was a refusal to sanction a purely arbitrary measure of tax liability.

The invalidity of the enforcement procedure which appellees seek to invoke is emphasized by the further fact that appellants could not learn of Eastern's tax deficiency. The so-called "secrecy provisions" of Section 514 of Article 21 which were in effect when the claim against appellants was asserted[*] made it legally

[*] They have since been repealed. N.Y. Sess. Laws 1955, c. 165.

impossible for an appellant to discover whether Eastern as a prospective purchaser was in any way delinquent in the payment of its highway use taxes. The only notice appellants had of Eastern's delinquency took place after the tractors had been repossessed, and this notice was in the form of the actual placing of the liens in question.

Because of the secrecy provisions appellants were not only denied notice of proceedings affecting their property interests, but they were denied any information that they might have requested. While the state may prescribe the kind of notice and the mode in which it shall be given, it cannot dispense with notice completely.

Any discussion of the constitutionality of the statute here questioned must include an examination of its practical effects, for the real question in constitutional law "is how the State makes the exaction [of highway use taxes]—that is, what is the nature of the exaction, its basis and its practical operation." *Bode v. Barrett*, 344 U.S. 583, 589.

The New York lien provision, if sustained, will have far-reaching effects on established commercial practices because it places upon a conditional vendor the intolerable risk of losing his property for satisfaction of a vendee's taxes.

The only safe alternative left conditional vendors who wish to sell in New York would be to sell on a strictly cash basis. The high cash cost of large commercial vehicles would be prohibitive to most prospective purchasers. As a result, new companies would not enter the field of commercial transportation and smaller companies would be driven from the field as their presently

existing vehicles wear out. Section 506 of Article 21 of the New York Tax Law thus may place an insurmountable burden on appellants as industrial vendors of commercial vehicles. Aside from the demonstrable result of Section 506 which takes appellants' property without either substantive or procedural due process, unless prospective purchasers are able to make immediate payments in cash; appellants and other vendors similarly situated become immediately liable for the purchasers' prior taxes.

Appellants do not, of course, argue that the State of New York, upon a real finding of public necessity, would not have the constitutional power to severely limit or curtail credit transactions in the State. However, absent even an allegation of public necessity, appellants deny that their property may be taken and their business curtailed solely because of an overly broad statutory tax lien provision. One mile of highway use by a single vehicle, which involves a tax liability of less than one cent to the purchaser, may result in a tax liability to the vendor of several thousand dollars. Without a finding by the legislature that it is in the public interest that commercial vendors should be required to sell for cash, such a result cannot be sustained.

CONCLUSION

Section 506 effectively precludes the retention of the normal and customary security interest by the vast majority of industrial vendors of large commercial vehicles. Such a preclusion has clearly resulted in an unconstitutional taking of appellants' property without due process of law. No notice was given; access to pertinent information was forbidden; no hearing was held. It is not even alleged that a benefit was con-

ferred. No mention was made of consent. Indeed, such an unnecessary taking of the property of one person to pay the taxes of another is in itself clearly a violation of both procedural and substantive due process.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

States Imposing Highway Use Tax	Lien Provision	Prior Lien Provision	Property to Which Lien Attaches
1. Alabama Ala. Code, Tit. 48 §§ 301 (34), 301 (44) (1940)	Yes	No	All property of taxpayer.
2. Colorado Colo. Sess. Laws 1954, c. 31, §§ 3, 5 (5)	Yes	No	All personal property of taxpayer.
3. Florida Fla. Stat. Ann., §§ 323.15, 323.15 (1) (1943)	Yes	Yes	All real and personal property of taxpayer.
4. Idaho Idaho Code, § 49-127 (1948)	No	No	
5. Kentucky Ky. Rev. Stat., § 281.815 (1953)	No	No	
6. Maryland Md. Code Ann. Art. 81, § 269 (Flacks 1951)	No	No	
7. Michigan Mich. Stat. Ann. §§ 22.561, 22.564 (1937)	Yes	No	All personal property of carrier and also upon the vehicles of all persons leased by the taxpayer in its business.
8. New York N.Y. Tax Law Art. 21, §§ 503, 506 (1954)	Yes	Yes	All motor vehicles and vehicular units of taxpayer and also upon all vehicles and vehicular units used by taxpayer in its business.
9. North Dakota N.D. Rev. Code, § 39-0423 (1943)	No	No	
10. Ohio Ohio Rev. Code An., § 5728.06 (Page's 1954)	No	No	

APPENDIX A (Continued)

States Imposing Highway Use Tax	Lien Provision	Prior Lien Provision	Property to Which Lien Attaches
11. Oklahoma Okla. Stat. Ann. Tit. 47 §§ 22.5, 22.7 (1941)	Yes	Yes	Only upon the vehicle upon which the tax is due.
12. Oregon Ore. Rev. Stat. Tit. 57 § 767.825 (1953)	No	No	
13. South Carolina S.C. Code of Laws § 58-1433 (1952)	No	No	
14. South Dakota S.D. Code § 44.0426 (1939)	Yes	No	All personal property of taxpayer and also upon the vehicles of all persons leased by the taxpayer in its business.
15. Wyoming Wyo. Comp. Stat. §§ 60-1327, 60-1330 (1945)	Yes	No	All vehicles owned and operated by the taxpayer.

16. Kansas and New Mexico have recently repealed highway use tax statutes with their accompanying lien provisions. Kan. Laws 1955 c. 294; N.M. Laws 1955 c. 276, § 7.

IN THE

Supreme Court of the United States

October Term, 1955

No. 82

INTERNATIONAL HARVESTER CREDIT CORPORATION, ET AL.,
Appellants,

v.

ALLEN J. GOODRICH, ET AL., *Appellees.*

REPLY BRIEF FOR APPELLANTS

ARGUMENT

1. Appellees' primary argument is that appellants' interest in the three tractors should be termed "a security device". So characterized, appellees assert that as a matter of priority appellants' property in the tractors may be taken for the protection of state revenue. To appellants, however, the distinction between a security device and a property interest is a distinction without a difference.

Whatever may be the form of words employed, it cannot be denied that prior to repossession, appel-

lants' equity in the tractors amounted to approximately five thousand dollars. Nor can it be gainsaid that appellants have taken every legal and proper step available to them to protect their property rights. The tractors were physically repossessed by appellants more than a month before the time appellees asserted the liens and fixed their amount. There is not the slightest question that at every earlier stage appellants acted in good faith, complying exactly with every applicable New York law. They had given notice of their ownership by filing their vendor's conditional sales contracts as directed by statute. It is not denied that they later legally repossessed their tractors in accordance with their contract rights. Appellants could have done nothing more.

Semantics aside, the question which is presented on this appeal is whether the State may subject appellants' tractors to confiscation to satisfy not only taxes, but interest and even penalties which have no relation to either appellants or their property and for which they are not, and never were, personally liable.[1] We use the word "confiscation" advisedly, because, as the Court will recognize, appellants' rights against Eastern were extinguished on repossession of the tractors, and they have in consequence no possible remedy against anyone else by which they might recover the value of their property interest which the State has seized.

There is, of course, the additional issue, upon which appellants also rely: that because of looseness in draftsmanship both the statute itself, and the Regulations issued under it, are fatally defective in that they fail

[1] Opinion of Attorney General of New York, June 15, 1954.

to make any provision for the protection of the property rights of conditional vendors such as appellants. So far as concerns a carrier-taxpayer, the statute and Regulations require appellees to give the carrier-taxpayer notice of the assessment of the tax, notice of the seizure of his property, and ten days' notice of any intended public sale. In addition, the Regulations grant the carrier-taxpayer the right to a hearing, and the statute expressly provides for the remedy of court review.[2] In contrast, none of these protective rights was available to the appellants in this case.

2. The arbitrary action of the State officials is compounded by the secrecy which the State decreed should surround both the fact and the amount of any tax delinquencies under this statute. Recognizing no doubt that this secrecy is a fatal objection to its claim, the State now asserts here, for the first time, that "nothing in either the law or the record in this case indicates that the fact and the amount of an existing tax liability would not have been disclosed to conditional vendors upon inquiry to the proper state officials." (Brief, p. 26).

This statement of appellees is beyond comprehension in the light of the secrecy provisions of Section 514 of Article 21 of the New York State Tax Law[3] which, as above stated, in terms forbade the disclosure of any information concerning tax delinquency under the Highway Use Tax, and indeed made it a misdemeanor to divulge or make known in any manner any

[2] See Appendix A, containing the relevant sections of the statute and the regulations.

[3] For the full text of Section 514, see Appendix B.

information with respect to the Highway Tax returns.[1] Absent a crime on the part of a tax commission official, it is difficult to see how appellants could have had notice of Eastern's tax delinquency. Implied notice has never been held to include the surreptitious and illegal securing of information.

Appellees throughout their brief place reliance upon the doctrine of imputed knowledge. That is, they assert that appellants must be held to have had knowledge of the existence of the statute and of the taxes levied thereunder against the carrier. But in this case the only knowledge which could be imputed to appellants is the fact that there was a state statute under which it was possible that the carrier-taxpayer might or might not pay taxes assessed against it. In this particular case this doctrine goes no further. The answer to appellees lies in the fact that by affirmative action the Legislature, in the secrecy provisions of Article 21 prevented the appellants from securing any of the pertinent information necessary for the protection of their property rights. In short, it is the application of the secrecy provisions which gives to this case one of its most singular features.

3. Appellees, in further elaboration of their contention that the case should turn on the characterization of appellants' property right as a "security device", assert (Brief, p. 25) that the gravamen of appellants' claim is that the State of New York has no power to restrict the manner of conducting credit transactions. The Court, however, will have noted that

[1] On March 25, 1955, after the entry of the final judgment in this case by the New York Court of Appeals, the New York Legislature amended Section 514 by adding a sentence which authorized the publication of the names of delinquent taxpayers by the State Tax Commission. Obviously, this amendment has no relevance to this case.

appellants concede the power of the State of New York appropriately to deal with credit transactions. There is little doubt that upon proper legislative findings, the State of New York could curtail credit transactions throughout the State. However that may be, what is at issue here is the taking, without notice or hearing, of one person's property to pay the unrelated taxes of another.

Indeed, appellees are forced to carry this contention to the extreme in asserting that what has been done must be valid because the lien provisions of the Highway Use Tax may be regarded as an amendment of the Conditional Sales Act Law. Appellees fail to note, however, that so regarded, appellants have been subjected to the liabilities of a delinquent taxpayer but, as already pointed out, they have been denied the rights to notice, hearing and ultimate judicial review which Article 21 of the Tax Law accords to delinquent taxpayers. As already pointed out, not only has appellants' property been taken, but appellants are left without a single remedy.

4. Appellees also make much of the point that had New York adopted a gross receipts tax instead of a Highway Use Tax, the lien in question could not have been broken down and attributed to separate motor vehicles employed by the carrier. The short answer to this argument is that New York did enact a use tax rather than a receipts tax. Having done so, appellees cannot be heard to argue that appellants' property has not been taken without notice and hearing simply because another type of legislation might have been enacted. Appellees must defend what they have done, not what they might have done.

5. Finally, appellees argue what appellants do not contest, that the Highway Use Tax itself is a valid

tax. The issue here is the attempted application of the lien provisions which result in the imposition of the Highway Use Tax on those who do not use the highways, and who are not subject to the tax. To the extent that appellants' property has been used on the highways there is no contest. However, when appellants are forced to pay for the highway use of other tractors by the carrier simply because appellees assert that what other states have done—apportioning the lien to the mileage use of the several tractors—would be inconvenient for New York the issue is drawn and the contest is clear.

In this connection it is significant that the Commission's Regulations required taxpayer-carriers to keep separate records of daily mileage use for each separate tractor.[5] Such records were in effect required by the provisions of the statute which base the tax "upon the gross weight of each vehicular unit and the number of miles it is operated on the public highways". Nothing in the statute required the imposition of a blanket lien on the three tractors of appellants for all the taxes, interests and penalties due for all the vehicles used by the taxpayer on the public highways of New York.

Respectfully submitted.

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[5] See Appendix C, containing Regulations 21, Art. 100 "Required Records".

APPENDIX A

The Truck Mileage Tax

Regulations 21 (1953)

Art. 118. Revision of Returns. (Law § 510).

If in the opinion of the State Tax Commission the return of any taxpayer is insufficient or incorrect, the Tax Commission by written notice to the taxpayer may require the filing of a corrected return within twenty days from the date the notice was mailed.

If the taxpayer fails to file a corrected return within the time required, or fails to file any return, the State Tax Commission is authorized to make a determination of the tax, from any information available. The Commission may examine the books and records of the carrier, take testimony and require proof, material for its information for the purpose of determining the tax.

The State Tax Commission may make such determination of tax within five years after a return has been filed, or at any time if no return has been filed.

After notice of the determination of tax is given the taxpayer, the determination becomes final, unless the taxpayer requests a hearing at which time he may submit such further information as he deems advisable. The application for a hearing must be made in writing and must be made within thirty days from the mailing of the determination of tax. After the hearing, the State Tax Commission will notify the taxpayer, in writing, of its decision.

Art. 119. Judicial Review. (Law § 510)

At any time within thirty days after service of notice of the decision of the State Tax Commission and upon depositing or securing the amount of tax and penalty due with the Commission, and securing the costs and charges of the proceeding, the taxpayer may institute a proceeding in the Supreme Court of the State of New York under Article 78 of the Civil Practice Act to review such determination. This remedy is the exclusive remedy available to any taxpayer to secure a judicial determination of his liability for taxes under Article 21 of the Tax Law.

§ 314. Secrecy of Returns

1. Except in accordance with proper judicial order or as in this section or otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner, any officer or employee of the department of taxation and finance, or any officer or person who, pursuant to this section, is permitted to inspect any return or report or to whom a copy, an abstract or a portion of any return or report is furnished, or to whom any information contained in any return or report is furnished, to divulge or make known in any manner the contents or any other information relating to the business of a carrier or other person contained in any return or report required under this article. The officers charged with the custody of such returns or reports shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the state, the department of taxation and finance, the department of public service or the tax commission in an action or proceeding under the provisions of this chapter, the vehicle and traffic law or the public service law, on behalf of any party to any action or proceeding under the provisions of this article or the vehicle and traffic law or the public service law when the returns or the reports or the facts shown thereby are directly involved in such action or proceeding, or on behalf of officers to whom information shall have been supplied as provided in subdivision two of this section, in any of which events the court may require the production of, and may admit in evidence so much of said returns or reports or of the facts shown thereby as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the tax commission, in its discretion, from allowing the inspection or delivery of a certified copy of any return or report filed under this article or of any information contained in any such return or report by or to a duly authorized officer or employee of the department of public service; or by or to the attorney general or other legal representatives of the state when an action shall have been commenced pursuant to the provisions of this chapter, the vehicle and traffic law or the public service law in which such returns or reports or the facts shown thereby are directly involved; or

the inspection of the returns or reports required under this article by the comptroller or duly designated officer or employee of the state department of audit and control, for purposes of the audit of a refund of any tax paid by any person under this article; nor to prohibit the delivery to any person, or a duly authorized representative of such person of a certified copy of any return or report filed by such person pursuant to this article, nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns or reports and the items thereof. Returns and reports shall be preserved for five years, and thereafter until the tax commission orders them to be destroyed.

g. The tax commission, in its discretion and pursuant to such rules and regulations as it may adopt, may permit the commissioner of internal revenue of the United States, or the appropriate officers of any other state which imposes a similar highway use tax, or the duly authorized representatives of such commissioner or of any such officers, to inspect returns or reports made pursuant to this article, or may furnish to such commissioner or other officers, or duly authorized representatives, a copy of any such return or report or an abstract of the information therein contained, or any portion thereof, or may supply such commissioner or any such officers or such representatives with information relating to the business of any person making returns or reports hereunder. The tax commission may refuse to supply information pursuant to this subdivision to the commissioner of internal revenue of the United States or to the officers of any other state if the statutes of the United States, or of the state represented by such officers, do not grant substantially similar privileges to the tax commission of this state, but such refusal shall not be mandatory. Information shall not be supplied to the commissioner of internal revenue of the United States or the appropriate officers of any other state which imposes a similar highway use tax, or the duly authorized representatives of such commissioner or of any of such officers, unless such commissioner, officer or other representatives shall agree not to divulge or make known in any manner the information so supplied, but such officers may transmit such information to their employees or legal representatives when necessary, who in turn shall be subject to the

same restrictions as those hereby imposed upon such commissioner, officer or other representatives.

3. Any offense against subdivisions one or two of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court and if the offender be an officer or employee of the state, he shall be dismissed from office and be barred from holding any public office in this office for a period of five years thereafter. Added L. 1951, c. 74, § 2; amended L. 1954, c. 128, § 2, eff. March 15, 1954.

APPENDIX C

The Truck Mileage Tax

Regulations 21 (1953)

Art. 100. Required Records. (Law § 507)

Every carrier who operates a motor vehicle in this State, which is subject to the tax under Article 21, must maintain an accurate daily record of all operations of such vehicle in this State.

This daily record of operations shall be in the form of a manifest or trip record. The record must contain the following information:

1. The date of each trip.
2. The permit and vehicle numbers.
3. The point of origin and destination for each trip.
4. The number of round trips each day.
5. The number of miles travelled laden.
6. The number of miles travelled empty.
7. The name of the owner if operating a leased or interchanged vehicle.

The daily manifest or trip record shall show each trip for the day. If the daily manifest is used to record the operations of more than one vehicle, a monthly summary shall be prepared for each vehicle or vehicular unit at the end of each month.

* * *

In addition, speedometer readings, fuel consumption records, maps, mileage or tariff schedules or record of mileage used for billing purposes and used to compute the taxable mileage shall be kept available. The mileage shown in the daily manifest or trip records for each vehicle shall be totaled at the end of each month and entered on the monthly tax return. (Form TMT-3).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 82

INTERNATIONAL HARVESTER CREDIT CORPORATION, *ET AL.*,

Appellants,

against

ALLEN J. GOODRICH, *ET AL.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLEES

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLEES

Statement

This is an appeal from a judgment of the Court of Appeals of the State of New York, affirming a judgment of the Appellate Division of the Supreme Court, Third Judicial Department, which upheld the constitutionality of the lien provisions of the New York State Highway Use Tax (N. Y. Tax Law, Art. 21, § 506) and adjudged that the defendants, constituting the State Tax Commission, recover from the plaintiffs by virtue of their paramount lien, superior to the liens of the plaintiffs under conditional sales agreements, the highway use taxes, penalties and interest due and owing by Eastern Cartage and Leasing Co., Inc.,

a motor carrier subject to the tax, which had accrued prior to the time the plaintiffs repossessed their trucks pursuant to the conditional sales agreements.

This was an action for a declaratory judgment submitted upon agreed facts, pursuant to Section 546 of the New York Civil Practice Act, to the Appellate Division of the Supreme Court of the State of New York, Third Department (R., 1-10). The Appellate Division, in a unanimous opinion, granted judgment to the defendants (R., 12-17). On appeal to the Court of Appeals, this judgment was affirmed without a majority opinion. One judge dissented and wrote a dissenting opinion (R., 20, 21).

The case is here on appeal, this Court having noted probable jurisdiction on October 10, 1955.

Question Presented

Whether the State of New York may prospectively limit the security interest of a conditional vendor of a truck by subordinating it to the State's lien on all of the trucks operated by the conditional vendee, a motor carrier, for all highway use taxes incurred by the conditional vendee, both prior to and during the time it operated the truck in question on the highways of the State.

The Statute

In 1949, the New York legislature, taking note of the damage caused the highway system of the State by heavy commercial vehicles operated by common carriers and the consequent additional costs necessary to construct and maintain the highways for such vehicles, created a joint legislative committee to make a detailed study of the revenues which might be raised from such commercial users

New York for many years the tax collector has been empowered to levy upon any property found in the county belonging to or in the possession of a tax debtor and this property may be sold for the payment of real property taxes (N. Y. Tax Law, § 71). The constitutionality of this section was upheld in *Hersee* v. *Porter*, 100 N. Y. 403, against the contention that it authorized the sale of the property of one person to satisfy a tax against another. At pages 409-410, the Court of Appeals said:

> "For the purpose of collecting the tax, the actual ownership, in contemplation of the statute, follows the actual possession. The possession under the statute is not merely a badge of ownership, it is title, so as to subject the property to seizure and sale for a tax against the possessor. Is the statute a violation of any constitutional guaranty? It has a very close analogy in the common law proceeding of distress for rent, which permitted the distraint of the property of a stranger found on the demised premises. The law of distress for rent was the law of this State up to 1846. The principle that the property of a stranger on the demised premises, might be distrained, was always recognized in our legislation, although its rigor was relaxed and its hardships mitigated from time to time by qualifications and exceptions. (2 R. S. 502, § 14.) I am not aware that the constitutionality of this feature of the law was ever questioned. Its validity has frequently been assumed by the courts. (*Holt* v. *Johnson*, 14 Johns. 425; *Spencer* v. *M'Cowen*, 13 Wend. 256; *Gilbert* v. *Moody*, 17 id. 354.) It is to be observed that this stringent remedy was permitted to enforce obligations between individuals. The similar remedy given by the tax laws is to enforce the sovereign and indispensable power of taxation. The section of the Revised Statutes now in question, was not an introduction by the revisers of a new remedy for the collection of taxes. The authority to seize and sell any property in the possession of a person taxed, for the payment of the tax, has been a part of the statute law of the State since 1801. * * * Each individual in the community has notice of the law, and is presumed to under-

of the State's highway system (Assembly Resolution (1949) No. 170). In 1951, this committee filed a comprehensive report, which found, among other things, that the existing highway tax structure, which consisted of fuel taxes and license fees, discriminated against automobiles and lighter trucks, in favor of heavier vehicles (N. Y. Leg. Doc. [1951] No. 67). The committee also found that out-of-State trucks paid little or nothing for the use of the New York highways. It concluded that immediate steps were necessary to provide additional revenue for the support of the highway system in such a manner that heavier trucks should pay a fair share of highway costs.

The Commission took note of the system of flat fees, but, despite the simplicity of administering such a tax, this was rejected because of its inequality. Consideration was given to a tax on gross earnings of motor carriers of the type which was then in force in over one-fourth of the states. This tax is customarily imposed on a base which includes that portion of the receipts from interstate commerce which is allocable to the taxing state. The committee rejected this type of tax because it is not closely connected with the extent of highway use and has a tendency to penalize efficient carriers operating with a large volume and a narrow profit margin. It was also noted that the experience in California had shown widespread attempts to evade the tax by the leasing of trucks to private shippers.

The committee concluded that a tax based on the weight-distance principle was the most equitable means of distributing the cost among the highway users. It proposed the so-called Highway Use Tax, which was enacted as Article 21 of the New York Tax Law (L. 1951, c. 74).

The committee recognized that its proposal sacrificed ease of administration and certainty of collection to the

more equitable method of apportioning the tax to highway usage (N. Y. Leg. Doc. [1951] No. 67, p. 70 *et seq.*). Effective enforcement measures were therefore included in the proposed legislation and were enacted.

The constitutionality of this tax was sustained by the New York Court of Appeals in *Mid-States Freight Lines, Inc.* v. *Bates*, 304 N. Y. 700. Certiorari was denied by this Court (345 U. S. 908).

Article 21 imposes on a "carrier" a highway use tax for the privilege of operating on the highways of New York State motor vehicles having a gross weight, alone or in combination, of over 18,000 pounds (§§ 501(2), 503).

The tax is imposed at rates fixed on a graduated scale correlated to gross weight groups beginning at 6 mills for vehicles in the group between 18,001 and 20,000 pounds and rising to 35 mills for vehicles weighing between 74,001 and 76,000 pounds, with an additional 2 mills per ton over that weight. The tax is found by multiplying the number of miles operated over the highways of the State by the appropriate weight group tax rate for the gross weight, as defined in the statute, when carrying any load and for the actual weight of the vehicle when unladen (§ 503).

Each carrier subject to the act is required to file monthly or, with the consent of the State Tax Commission, quarterly returns, reflecting the gross weight and the number of miles traveled on the highways of the State by trucks operated by the carrier. The returns reflect the tax liability of the carrier computed from the graduated scale (§ 505). The tax is due and payable at the time of filing of the return (§ 506). In the event no return is filed or the return is insufficient, the Tax Commission is authorized to make a determination of the amount of tax due from such information as is available (§ 510).

As noted above, the tax is imposed upon the carrier, which term is defined in the act as including any person having the lawful use or control or the right to use or control the vehicle (§ 503, 501(31)). It is provided, however, that where the carrier is not the owner of the truck, the tax is a joint and several liability upon both the carrier and the owner and the owner may file the necessary return (§ 503). The Attorney General of New York State, in a formal opinion dated June 15, 1954, ruled that a conditional vendor was not an owner within the meaning of the statute, since he retained legal title "as a special interest, protecting the unpaid purchase price of the vehicle" and "the transaction looks to defeasance of all his interest if completed in accordance with its terms" (1954 Atty. Gen. 219).

In recognition of the administrative difficulties involved in enforcing and collecting this tax, the statute provides extensive remedies as well as penalties, both civil and criminal (§ 512). One of the remedies afforded the State Tax Commission is the familiar tax lien and this section of the statute forms the basis of the present controversy.

> "The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit." (N. Y. Tax Law, § 506)

Another section of the statute provides for summary collection through forced sale of the vehicles subject to the lien.

"Whenever any person is delinquent in the payment of any amount due under this article the commission may forthwith collect such amount from such person by seizing any motor vehicle or vehicular unit subject to the lien of the tax and may thereafter sell it at public auction to pay the fees, taxes, interest and penalties and any costs incurred on account of the seizure and sale, after giving ten days' notice of the sale in writing to such person. The proceeds of such sale shall be paid into the state treasury to the credit of the general fund provided, however, any excess received upon the sale over the amount of the fees, taxes, interest and penalties shall be refunded to such person." (N. Y. Tax Law, § 511(3)).*

The Facts

Eastern Cartage and Leasing Co., Inc. (hereinafter called Eastern), is a New York corporation, having its principal place of business in Schenectady, New York, and from January 1, 1952, the effective date of the Highway Use Tax, through February of 1954, the period here involved, Eastern was a carrier subject to the provisions of Article 21 of the New York Tax Law (R., 2). Eastern operated at least 15 trucks on the highways of New York State during this period and incurred liability for highway use taxes under Article 21 of the Tax Law in the amount of $2,688.77 for the period between January 1, 1952 and December 31, 1953 (R., 2). For the months of January and February 1954, Eastern incurred further liability for highway use taxes in the amount of $470. These tax liabilities were unpaid and, as a result, Eastern was liable for penalties and interest thereon in the amount of $559.27, together with additional interest of 1% per month on the unpaid taxes from April 21, 1954 (R., 3).

* A 1955 amendment to this section made provision for giving notice of the sale to the owner of any such vehicle, provided he had filed with the Tax Commission a statement of his ownership.

Early in 1953, approximately two years after the enactment of the Highway Use Tax and over one year after its effective date, International Harvester Company sold Eastern two tractors, which were motor vehicles subject to the provisions of Article 21 of the Tax Law (R., 3, 5). Both of these vehicles were operated by Eastern on the public highways of New York State (R., 3, 5) and remained in the possession and control of Eastern until January 26, 1954 (R., 3, 5). As a part of the purchase price of these vehicles, Eastern executed and delivered to International Harvester Company conditional sales agreements covering each of the vehicles, and these agreements were assigned to International Harvester Credit Corporation (hereinafter called International) and were duly filed in the office of the Clerk of the Town of Rotterdam, Schenectady County, New York (R., 3, 5).

Eastern defaulted in making payments under the conditional sales agreements and both of the vehicles were repossessed by International on January 26, 1954 (R., 3, 6). Thereafter, International bid in both vehicles at a public sale and subsequently sold them to third parties, whereupon the State's lien on the vehicles for the unpaid highway use taxes of Eastern attached to the proceeds of these sales.

The plaintiff, Brockway Motor Company, Inc., engaged in a similar transaction with Eastern involving one motor vehicle, and the facts with respect to this transaction are substantially the same except that the sale took place in August of 1953 and the vehicle was not repossessed until March 26, 1954. This vehicle remains in the possession of Brockway (R., 4).

In April of 1954, the defendant, State Tax Commission, asserted against each of the three motor vehicles described

above a lien in the amount of Eastern's unpaid highway use taxes, together with the penalties and interest thereon. The plaintiffs were afforded an opportunity to obtain a release of the lien by filing a commercial bond in the full amount of the taxes, penalties and interest which had been assessed against Eastern and claimed as a lien on the trucks.

Opinions Below

The Appellate Division of the Supreme Court, Third Department, to which this controversy was originally submitted, held that the State had the power to secure its prerogative right to the payment of taxes by making that right paramount to the plaintiffs' security for their private debts and that there was no constitutional requirement to apportion the lien on the basis of the particular vehicle's actual use of the highway. During the course of its opinion, the Appellate Division said:

> "The tax is imposed on the carrier as he avails himself of the use of the State's highways. It is determined by the extent of that use, irrespective of the number of trucks employed. If he fails to pay the tax, recourse may be had to his property, a common and recognized procedure. Sound reason justifies the method of enforcing the payment of the tax adopted in this statute. It could well happen that trucks constitute the sole tangible resources of a carrier. The nature of the ownership and possession of trucks is transient. It would be neither safe, practicable nor reasonable to apportion the lien of an unpaid tax on the basis of each of several vehicles' actual use of the highway. Such a prorating or subdivision is no more to be expected than where a state seeks to collect an income tax from a nonresident by enforcing payment of the tax and considering his property and business interests in the state as a single [fol. 27] entity in order to enforce payment of the tax by lien thereon." (R., 15)

Since on the oral argument the State had conceded that its lien did not extend to taxes incurred after the repossession of the vehicles, the judgment of the Appellate Division fixed the lien for unpaid taxes on International's trucks in an amount which represented the taxes incurred by Eastern up to January 26, 1954, plus interest and penalties. The lien on the Brockway truck was fixed in the total amount of unpaid taxes, plus interest and penalties, since it was not repossessed until March of 1954.

The Court of Appeals affirmed without majority opinion. One judge dissented in an opinion which recognized the propriety of the lien priority with respect to highway use taxes incurred by the particular vehicles, but challenged the extension of such a lien to highway use taxes incurred without reference to the particular vehicles. In his dissenting opinion, Judge Van Voorhis noted:

> "In voting to modify the judgment appealed from in these respects, I do not imply that some of the objects of this part of [fol. 38] Article 21 of the Tax Law could not be realized by legislation giving effect to legitimate property rights of conditional vendors under such circumstances." (R., 21)

Argument

The proper presentation of the issue in this case requires the elimination at the outset of certain extraneous arguments which find emphasis in the appellants' brief. In the first place, the appellants' argument proceeds on the theory that their property interest in the vehicles subject to the lien is the traditional complete ownership of personal property. No recognition is accorded the fact that the carrier was the beneficial and substantial owner with possession, use and control of these motor vehicles.

Secondly, in Point I of appellants' brief, it is argued that use taxes can be imposed only in relation to benefits conferred, yet it is perfectly clear that here the issue does not involve the imposition of the tax, but rather the means employed to effect its collection. The Highway Use Tax is imposed on the carrier and, in some instances, on the owner; but never on the conditional vendor. Its constitutionality as so applied has been sustained and is here conceded. Thirdly, there is here no question involving vested rights. At the time the appellants entered into these transactions, they were presumably aware that by placing these motor vehicles in the possession and control of Eastern, a New York carrier, they were subjecting their security interest to the prior lien of the statute. Finally, there is here no question of statutory construction. The intent of the Legislature is manifest and the meaning of the lien provision is crystal clear.

Turning to the affirmative, the question which is before this Court can be considerably narrowed by giving effect to appellants' concessions and applying well-established principles of constitutional law. It is admitted that the application of the lien provisions of the statute are perfectly valid insofar as they extend to taxes which accrued as a result of the operation of the particular motor vehicles here involved (Applts' Br., p. 15). Thus, it is conceded that however the interest of appellants may be described, it is defeasible to this extent. Moreover, in the light of the precedents, it must be further conceded that the State's taxing power in this area is not restricted to the imposition of taxes measured by the actual use of the highways by specific vehicles. *Capitol Greyhound Lines v. Brice*, 339 U. S. 542. Thus, a tax in the nature of fixed fees or one measured by gross receipts was within the orbit of permissible legislative action. Had the Legislature adopted

either of these taxing devices, the appellants could not be heard to argue that their security interest was immune from the lien. *New York Terminal Co. v. Gaus*, 204 N. Y. 512. Thus, the rationale of appellants' argument is that the State, by adopting a more equitable method of allocating the responsibility for the cost and maintenance of its highways, has in effect restricted its sovereign power to ensure the collection of these taxes prior to the citizen's security for private debts.

Viewed in another light, the gravamen of the appellants' claim is that the State has no power to restrict their manner of conducting commercial credit transactions. From time immemorial, legislative bodies have seen fit to regulate such transactions in the exercise of both the taxing power and the police power. Thus, both at common law and by statute, liens such as the innkeepers' lien attached to property in possession without regard to ownership and the familiar device of distraint for rent similarly ignored this distinction. The lien for real property taxes traditionally extends to all personal property located on the premises taxed (N. Y. Tax Law, § 71). This principle has been particularly prevalent in the field of security transactions. Thus, in some jurisdictions, a conditional vendor was for many years accorded no protection of his interest against third parties. Under the Conditional Sales Act, this security interest is still subject to defeasance in many instances. It is clear, therefore, that the State has the power to regulate and restrict the use of personal property within the State and the present statute may properly be regarded as an exercise of this power. It is in effect an amendment to the Conditional Sales Act, which puts conditional vendors on notice that by placing in the hands of carriers trucks of over 18,000 pounds gross capacity, they

are subjecting their security interest in such trucks to the paramount lien of the State for the highway use taxes incurred by that carrier through the use of the State's highways. It is important to note that there is no issue in this case of the application of the lien provision to transactions entered into before it became law. True, this constitutes a restriction in some small degree on the appellants' right to conduct commercial transactions in the manner of their own choosing, but the restriction is amply justified by the urgent necessity of constructing and maintaining a State highway system adequate to accommodate motor vehicles which the appellants have a direct interest in placing on those highways.

POINT I

Appellants' property interest is in substance a security device, which may constitutionally be conditioned and restricted for the protection of State revenues.

The appellants' basic premise is that the application of the lien provisions of the New York Highway Use Tax is an unconstitutional taking of their property. It is, therefore, necessary to analyze the nature of this property interest as bearing upon the reasonableness of the lien asserted by the State.

While at common law the conditional vendor's legal title was generally paramount, the courts have always recognized the power of the Legislature to restrict and even cut off the vendor's interest in such transactions. Indeed, some states for many years failed to accord any recognition to the interest of a conditional vendor, except as between the vendor and vendee, and this practice does not appear to have raised any constitutional challenge. *Barber Asphalt*

Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193. Viewed realistically in the light of the present-day legislation and precedents, the interest of a conditional vendor must be regarded solely as a security device for the payment of a private debt. *Williston on Sales* (Rev. ed. 1948), § 330. The entire contract looks to the eventual passage of the security title to the purchaser, who acquires not a contract but a property right. Possession is delivered to the buyer and he may maintain that possession as against the world, provided he complies with the terms of the contract. This possession and use are in reality beneficial ownership, which is itself a reasonable connection between the trucks and the tax lien.

The most recent pronouncement of the New York courts on this subject is found in *Schnitzer* v. *Fruehauf Trailer Co.*, 283 App. Div. 421, aff'd 307 N. Y. 876. At page 431, the Appellate Division said:

> "The parties to a conditional sale have divided property interests in the goods. The buyer is the beneficial and substantial owner, with such attributes of ownership as possession, use and control, and has his equity of redemption sedulously guarded by the law. The seller, on the other hand, reserves title to the goods solely as security for payment or performance by the buyer. Essentially a conditional sale is only a credit device. Its plain and obvious purpose is the same as a purchase-money chattel mortgage despite technical or theoretical differences between the two forms of security.
>
> "The retaking * * * is simply for the purpose of enforcing the seller's security for the price by foreclosure of the defaulting buyer's equity of redemption."

The Uniform Conditional Sales Act, which was enacted in New York State as Article 4 of the Personal Property Law, presupposes the power of State legislatures to regulate the reservation of property in goods sold by conditional

vendors. Thus, the reservation is void as against purchasers or creditors unless the conditional sales contract is filed within a limited period of time in the proper place (N. Y. Personal Property Law, §§ 65, 66). Additional restrictions are imposed with respect to material furnished under public contracts (N. Y. Personal Property Law, § 65-a), fixtures (N. Y. Personal Property Law, § 67) and railroad equipment or rolling stock (N. Y. Personal Property Law, § 68). Moreover, in the event the conditional vendor delivers goods and either expressly or impliedly consents that the buyer may resell them, the reservation of legal title is void as to purchasers from the buyer even though the conditional sales contract has been properly and timely filed (N. Y. Personal Property Law, § 69). The constitutionality of these restrictions has never been seriously questioned.

The statute here under attack may properly be regarded as an additional restriction on the right of a conditional vendor to reserve a security interest in property which is placed in the possession and control of a third party. The enactment of this legislation was in fact notice to such conditional vendors that in the future New York State would not recognize such a reservation of title as against highway use taxes incurred by the carrier who was placed in possession of the property. The legislation was, in effect, an amendment to the Uniform Conditional Sales Act.

There is certainly nothing new or novel in legislation which subjects the interest of third parties in either personal or real property to the paramount claim of a private lien holder or the tax collector. Thus, at common law, under the familiar device of distraint for rent, a landlord could resort to all property in the possession of his tenant

for payment of the rent even though the complete title to the property was in a third person. *Holt v. Johnson*, 14 Johns. (N. Y.) 425; *Spencer v. McGarren*, 13 Wend. (N. Y.) 256. Both at common law and pursuant to statute, an innkeeper was afforded a lien against all property brought upon the premises by a guest (N. Y. Lien Law, § 181). In *Waters & Co. v. Gerard*, 189 N. Y. 362, the Court held that the innkeeper's lien attached to a piano and prevailed over the interest of a prior conditional vendor. Moreover, the lien was held to extend to sums owing for board and extras and was not confined to the amounts due for lodging alone.

A striking analogy to the lien asserted by the State in the case at bar is found in the old agister's lien, which gave to the owner of pasturage a lien upon cattle placed in his pasture for the value of the forage they consumed. This lien did not exist at common law and is the creature of statute or agreement (N. Y. Lien Law, § 183). It has been held superior to a prior chattel mortgage. *Corning v. Ashley*, 51 Hun 483, aff'd 121 N. Y. 700. Here, the State may be regarded in the role of a modern agister. The highways, like the pasturage, are being consumed by the mechanical successor to the horse. For the use of those highways, there is imposed upon the person in possession and control of the trucks a highway use tax. As security for the payment of the tax, the State looks to all of the trucks of the carrier using the highways just as the agister looked to all of the cattle using his pasture, and the rights of the holder of a security interest in either the cattle or the trucks are properly subordinated to this lien.

If the rights of private creditors may properly be preferred to the security interests of third parties, it must follow that the rights of the sovereign in the collection of its taxes should be afforded similar treatment. Thus, in

stand that if his chattels are by his consent or permission in the possession of another, they can be taken for a tax against the person in possession."

In *Minneapolis Threshing Mach. Co.* v. *Roberts County*, 34 S. D. 498, 149 N. W. 163, threshing machinery which had been assessed as part of a tax debtor's property was seized under a distress warrant and subjected to taxes assessed not only against the particular machinery, but other taxes of the tax debtor as well. The validity of the statute which authorized such action was sustained over the objection of the vendor of the machinery, who had foreclosed a chattel mortgage and reacquired title prior to the distraint. The Court stated at 149 N. W. 164:

> "This section of the statute was in effect when appellant's mortgages were executed, and is therefore controlling upon the parties to such mortgage. It became a part of the contract, and such mortgages must be treated as though the said section had been incorporated therein. The power of the Legislature to make personal taxes a paramount lien on the property of the tax debtor cannot be seriously questioned at this day. Statutes giving tax liens priority over all other liens and incumbrances are not in contravention of any constitutional prohibition."

See also:

Jordan v. *Baggett*, 165 Ga. 665, 140 S. E. 902;
Weber Showcase and Fixture Co. v. *Kaufman*, 45 Ariz. 397, 44 P. (2d) 158;
Landis Machine Co. v. *Omaha Merchants Trans. Co.*, 142 Neb. 397, 9 N. W. (2d) 198.

Appellants give somewhat grudging recognition to "the constitutional power to severely limit or curtail credit transactions in the State" (Applts'. Br., p. 25). They argue in one place that the exercise of such a power must be predicated upon a finding of public necessity and, in

another place, that the lien cannot be sustained without a finding that it is in the public interest that commercial vendors should be required to sell for cash. This Court will traditionally accord to legislative action the presumption of rationality and, certainly, the collection of additional public revenues to support and maintain the State highway system is a most urgent public necessity. With respect to the second suggested finding, it is indeed a bold speculation to assume that this lien provision requires that all commercial vehicles be sold for cash. If the credit of the operating carriers is that poor, it affords all the more justification for the steps the Legislature has taken to ensure the payment of the highway use taxes it has imposed.

The opinion of Mr. Justice Cardozo in *Burnet* v. *Wells*, 289 U. S. 670, is here particularly pertinent. This Court has made clear that in the collection of taxes, the sovereign is not constrained by refinements of title carried over from common-law concepts. At pages 677-679, Mr. Justice Cardozo said:

> "The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process always are, not narrowly or pedantically, in slavery to forms or phrases. 'Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid.' [citing cases] * * * Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common law traditions. The question is whether it is one that an enlightened legislator might act upon without affront to justice. Even administrative convenience, the grace

tical necessities of an efficient system of taxation, will have head and recognition within reasonable limits. * * * A margin must be allowed for the play of legislative judgment."

POINT II

The subordination of the reservation of legal title by conditional vendors of trucks to the tax lien is a valid exercise of the State's prerogative right to priority.

This case does not involve the imposition of a tax upon the appellants or upon the trucks in which appellants hold a security interest. The New York highway use tax is imposed upon the carrier, Eastern, and as construed by the Attorney General of New York State the appellants, as conditional vendors, have no liability for the payment of Eastern's taxes. The challenge here is directed at the means designed by the State Legislature to ensure the payment of this concededly valid tax. The issue is the State's power to prefer Eastern's tax obligation over not only its private debts but also the security interest of its private creditors.

There can be no question of the State's right to priority. Indeed, this appears to be conceded by appellants' statement that the "issue is not priority but the reasonableness of what was made prior" (Applts'. Br., p. 8). The right of the People of the State to a preference over common creditors even in the absence of statute has long been recognized in New York State as a sovereign prerogative. *Matter of Carnegie Trust Co.*, 206 N. Y. 390. Although this priority did not at common law prevail over specific liens existing in favor of private creditors, this Court has explicitly recognized the power of the New York Legislature

to make such a provision. In *Marshall* v. *New York*, 254 U. S. 380, this Court said at pages 383-384:

> "This priority arose and exists independently of any statute. The legislature has never, in terms, limited its scope; and the courts have rejected as unsound every contention made that some statute before them for construction had, by implication, effected a repeal or abridgment of the priority. The only changes of the right made by statute have been by way of enlarging its scope in certain cases. Thus, while by the common law of England, *The King (in aid of Braddock)* v. *Watson*, 3 Price, 6, and by that of New York, *Wise* v. *L. & C. Wise Co.*, 153 N. Y. 507, 511, the priority does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the legislature of New York extended the prerogative right, so as to give certain taxes priority over prior incumbrances. An extension of this nature is found in § 197 of the Tax Law which declares in respect to the annual franchise tax, that 'Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full.' By reason of that provision the annual franchise tax takes priority over incumbrances on the corporate property. *New York Terminal Co.* v. *Gaus*, 204 N. Y. 512."

In *New York Terminal Co.* v. *Gaus*, 204 N. Y. 512, the binding force of which was acknowledged in *Marshall* v. *New York*, 254 U. S. 380, the successor in interest to a private creditor, whose obligation was secured by a mortgage on the corporate real property, claimed that franchise taxes imposed by the State subsequent to the mortgage security were not a prior lien on the corporate property. The private creditor argued that since the franchise tax was not imposed directly upon the property of the corporation, it could not be paramount to the prior encumbrances. Despite the circumstance that the language of the statute

was far from explicit, the Court held that the State's priority prevailed. At page 516, the Court said:

> " * * * Operation, therefore, could only have been under the corporate franchise and if so, then, I think that the right of the comptroller to levy a franchise tax attached and that the tax became a lien upon the corporate assets paramount to all prior incumbrances. It was made paramount by the statute making it 'a lien upon all the real and personal property * * * until the same is paid in full.' (Tax Law, sec. 197; *Eaton's Appeal*, 83 Pa. St. 152.) It was paramount, for the reason that the tax was upon the privilege of exercising the corporate franchise and of carrying on the business, through which the company was, by its earnings, to provide for its obligations. The paramount nature of the lien is necessarily implied, and is not affected by the existence of prior incumbrances; any more than the tax would be affected by the fact that the company had operated its franchise at a loss. * * *"

In *Liford* v. *State of New York*, 140 F. (2d) 840 (C. C. A. 2d), cert. den. *sub nom. Bankers Trust Co.* v. *New York*, 323 U. S. 714, the Federal Court accorded the same effect to a lien on railroad property for moneys advanced by the State in connection with grade crossing elimination. In the succeeding case of *State of New York* v. *Gibhardt*, 151 F. (2d) 802 (C. C. A. 2d), cert. den. *sub nom. Bankers Trust Co.* v. *New York*, 327 U. S. 788, the priority of the grade crossing lien over mortgages was expressly sustained against constitutional objections based on claims of denial of due process and impairment of contract obligations. The due process objection was founded chiefly on claimed lack of adequate notice to mortgagees. The Court disposed of that contention on the ground that "the statute was notice to the mortgagees", citing *Anderson National Bank* v. *Luckett*, 321 U. S. 233, in which it was held that all

persons having property within a state must take notice of its statutes affecting the control or disposition thereof.

The relation between the tax and the protection afforded or benefits conferred by the state is of importance in determining the power to impose the tax. *Wisconsin v. J. C. Penney Company*, 311 U. S. 435. Such relationship is, however, of little or no consequence in determining the validity of the means employed to collect a tax which is conceded to be valid. That the lien need not be confined to specific property or limited to the property or income which occasioned the tax is made clear in *New York Terminal Co. v. Gaus*, 204 N. Y. 512.

See also:

Hodge v. *Muscatine County*, 196 U. S. 276;
Minneapolis Threshing Mach. Co. v. Roberts County, 34 S. D. 498, 149 N. W. 163;
State of Minnesota v. *Central Trust Co.*, 94 Fed. 244 (C. C. A. 8th), cert. den. 174 U. S. 803;
Fruehauf Trailer Co. v. State Corporation Com'n., 149 Kans. 465, 87 P. (2d) 641.

In *State of Minnesota* v. *Central Trust Co.*, 94 Fed. 244 (C. C. A. 8th), at pages 248, 249, the Court said:

> "* * * taxes levied by the state for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. In view of that necessity it has been a common practice to provide summary remedies for enforcing such demands, which have been upheld by the courts whenever assailed, although it is quite probable that some of the remedies so provided could not have been

sustained as affording due process of law, if the proceedings had related to the collection of purely private debts.

"The state has an undoubted power to create a lien for a personal tax on other property of the tax debtor than that which was assessed for the tax, and to make the same superior to all other liens."

No attempt is made to distinguish these cases which firmly establish the State's power to subordinate the prior security lien of a private creditor to the State's lien for the payment of obligations owing it by the debtor. True it is argued that some admittedly valid taxes "cannot be broken down and attributed to separate items of property" (Appits'. Br., p. 18). This would not seem applicable to funds advanced for grade crossing eliminations which are directly expended on specific items of the railroad's property. It is submitted, however, that if serious constitutional considerations inhere in the subordination of the private creditor's lien, they are not met by the practicality of breaking down and attributing the tax to separate items of property in the possession of the debtor. In other words, if a lien provision which cannot be broken down and attributed to separate items of property is constitutional there can be no constitutional requirement that in applying a similar lien provision the State must apportion as far as practicable.

An illustration of the tenuous nature of appellants' contention is afforded by a comparison between the New York and California tax structures affecting the use of highways. In California, the highway use tax is measured on the basis of a percentage of the carrier's gross receipts from truck operations and the lien of the State for the payment of such taxes is made prior to all private liens or

encumbrances and "to the rights of any holder of the legal title" (Deering, Cal. Code §§ 10096-10098 [Rev. & Tax. Co. A.]). Obviously, this is a tax that "cannot be broken down and attributed" to separate motor vehicles employed by the carrier. In the light of appellants' concessions and the determinations in *New York Terminal Co. v. Gaus*, 204 N. Y. 512, and *State of New York v. Gebhardt*, 151 F. (2d) 802 (C. C. A. 2d), cert. denied *sub nom. Bankers Trust Co. v. New York*, 327 U. S. 788, the conditional vendor who sells a truck to a California carrier could not be heard to raise a constitutional question because its security interest was subordinated to California's lien for such taxes.

It is perfectly clear that the New York State Legislature could have adopted the gross receipts method of measuring the highway use tax. *Capitol Greyhound Lines v. Brice*, 339 U. S. 542. In fact, the Joint Legislative Committee gave serious consideration to this type of tax and made a study of the California experience. The Committee, however, discarded this type of tax structure in favor of the more equitable method of measuring highway use by weight distance standards (N. Y. Leg. Doc. [1951] No. 67). The essence of the appellants' contention is that this legislative attempt to distribute more fairly the cost of constructing and maintaining the highway system has created a constitutional restriction which inhibits the prompt and efficient collection of the tax.

The appellants attack the lien provisions of the highway use tax on the ground that they are based on the convenience of the State rather than on any finding of public necessity. The same argument might well be made against the undoubted sovereign prerogative of priority which is certainly a convenience to the State, but it cannot be doubted that the prompt collection of taxes is always a matter of

public necessity and is in fact vital to the very existence of the State. *Haggar* v. *Reclamation District No. 108*, 111 U. S. 701; *Phillips* v. *The Commissioner*, 283 U. S. 589. This prerogative right of priority "is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts". *United States* v. *State Bank of North Carolina*, 6 Peters 29, 35.

There is, of course, a well founded presumption that the New York State Legislature, which had made a thorough study of the problem, acted in a reasonable manner and took appropriate steps designed to secure the collection of this tax. If their judgment can be supported by any state of facts, either known or which could reasonably be assumed, this legislation cannot be stricken down as arbitrary. *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Williamson* v. *Lee Optical Company*, 348 U. S. 483. This presumption is amply supported by the legislative study and by the circumstances inherent in the trucking industry. The main assets of any carrier operating motor vehicles are the trucks employed in its business. Traditionally a very large percentage of the sales of this type of motor vehicle involve some security arrangement wherein the truck manufacturer and seller retain an interest in the vehicle, but place it in the hands of the carrier for the express purpose of using the highways. Since these assets are highly mobile they may easily be placed beyond the physical reach of the State. Moreover, this tax was in part designed to reach interstate carriers who were found to contribute little or nothing to the support of the New York highways. Since these carriers have no situs in the State and their trucks are in transit, it was obviously necessary to extend the tax lien to all of the vehicles of the carrier

to cover all of the taxes incurred. To confine the lien to the taxes incurred by a particular truck would indeed render this method of collection highly problematical.

In bearing on the reasonableness of the legislative action, it must be conceded that these appellants are indeed closely connected with the whole problem of highway maintenance and construction. They are engaged in the manufacture and sale of trucks and the market for their product is entirely dependent upon the construction and maintenance of an adequate highway system. Appellants' argument that they would derive more benefit from less well-maintained highways is entirely belied by the tremendous interest shown by all motor vehicle manufacturers in promoting the development of improved State highway systems. The appellants entered into the transactions involved in this case with full knowledge of the existence of the highway use tax and its lien provisions. They placed these trucks in the possession and control of Eastern knowing they were to be used on the highways of New York State. They looked to the profits that Eastern expected to earn by the use of the highways of the State to pay the balance of the unpaid purchase price of the trucks and played an integral part in all of the matters and transactions which gave rise to this tax liability.

The provision of the law which formerly prevented disclosure of information contained in the Highway Use Tax returns has since been repealed (N. Y. L. 1955, c. 165). In passing, it should be noted that nothing in either the law or the record in this case indicates that the fact and the amount of an existing tax liability would not have been disclosed to conditional vendors upon inquiry to the proper State officials. Moreover, it is well established that in such tax proceedings the statute in and of itself constitutes suf-

ficient notice. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331; *B. K. Sweeney Electrical Co. v. Poston*, 110 Colo. 139, 132 P. (2d) 443.

The fact that the State took no action to assert the taxes and determine the extent of the lien until after the motor vehicles had been repossessed raises no constitutional problem. The lien attached as of the date the motor vehicles were first operated on the highways of the State and when the extent of the tax liability was determined it related back. *New York v. Maclay*, 288 U. S. 290; *United States v. Alabama*, 313 U. S. 274.

There remain for discussion the three State court cases cited on pages 16 and 17 of appellants' brief. *Pacific Finance Corp. v. Snohomish County*, 160 Wash. 384, 295 P. 110, appears to have little relevance to the question here presented. That case involved the seizure under a tax distraint of the property of a conditional vendee. The statute created no prior lien superior to the rights of the conditional vendor and the seizure did not purport to cut off those rights, but was limited to such rights in the property as the conditional vendee might have. The Washington Court held that the conditional vendee possessed no rights in the property. In *Universal Credit Co. v. Hamminga*, 214 Ia. 1135, 243 N. W. 513, the statute again made no attempt to assert a lien priority in favor of the State against a title reserved by the conditional vendor, and the Court held, as a matter of statutory construction, that the property subject to the lien did not include the conditional vendee's interest in the truck.

In *Fruehauf Trailer Co. v. State Corporation Comm.*, 149 Kans. 465, 87 P. (2d) 641, a case dealing with the Kansas gross-ton-mileage tax, the Court had before it a lien

statute very similar to the one at bar, which made clear that the lien priority extended to all of the trucks used in the business of the motor carrier. There, the Court enforced such statute to cut off the rights of the conditional vendor. This case is squarely in point and it is interesting to note that the majority of the Court rejected the very argument here advanced—that the lien must be confined to the taxes incurred by the operation of the particular vehicle. The case cannot be distinguished upon any difference between the New York and Kansas Courts in the treatment accorded a conditional vendor and, as noted above, the fact that the lien was asserted prior to repossession is of no consequence. The conjecture of the footnote—that the Kansas Legislature was moved to modify the lien provision in the belief that the Supreme Court of its own State had misconstrued the Constitution—is hardly worthy of comment.

Conclusion

At the time the appellants entered into the transaction involving the trucks here in question, they knew that their security interest was by law subordinate to highway use taxes which had already been incurred by the buyer and to highway use taxes which would be incurred in the buyer's future operations. They willingly chose to assume this risk. Such a restriction of security title is within the legislative power. The power is here exercised to protect the revenues of the State by asserting its prerogative right to prefer its claims to private debts and the security interest of private creditors. The lien provisions are reasonably designed and essential to safeguard the collection of an admittedly valid tax and make possible the construction and maintenance of a highway system vital to the appellants' business.

It is respectfully submitted that the lien provisions of the New York Highway Use Tax are constitutional and that the judgment of the Court of Appeals of New York should be affirmed.

Dated: December 30, 1955.

Respectfully submitted,

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